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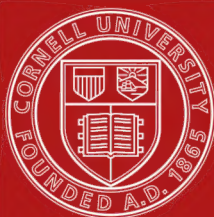


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A SELECTION OF CASES  
ON  
THE LAW OF TORTS.  
VOLUME I.





A SELECTION OF CASES  
ON  
THE LAW OF TORTS.

BY  
JAMES BARR AMES AND JEREMIAH SMITH.

VOLUME I.

By JAMES BARR AMES,  
~~BUSSEY~~ PROFESSOR OF LAW IN HARVARD UNIVERSITY.

Hussy

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## PREFACE.

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IN 1874 a collection of cases upon Trespass, Conversion, and Defamation, was printed by the instructor in "Torts" for the use of students in the Harvard Law School. The editor's intention to extend the collection over the whole field of "Torts" was not realized on account of his withdrawal from that subject to other branches of the law. The old book has now been worked over into the present volume to accompany a second volume prepared by the editor's colleague, Professor Smith, who now has charge of "Torts" in the school at Cambridge.

JAMES BARR AMES.

CAMBRIDGE, Sept 19, 1893.



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# CASES ON TORTS.

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## CHAPTER I.

### TRESPASS.

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#### SECTION I.

##### *Assault.*

##### I. DE S. AND WIFE v. W. DE S.

AT THE ASSIZES, CORAM THORPE, C. J., 1348 OR 1349.

[Reported in Year-Book, Liber Assisarum, folio, 99, placitum 60.]

*I. De S. & M. uxor ejus querunt de W. De S. de eo quod idem W. anno, &c., vi et armis, &c., apud S., in ipsam M. insultum fecit, et ipsam verberavit, &c.* And W. pleaded not guilty. And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he pounded on the door with a hatchet, which he had in his hand, and the female plaintiff put her head out at a window and told him to stop; and he saw her and aimed at her with the hatchet, but did not hit her. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done. THORPE, C. J. There is harm done, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no other harm. Wherefore tax his damages, &c. And they taxed the damages at half a mark. THORPE, C. J., awarded that they should recover their damages, &c., and that the other should be taken. *Et sic nota*, that for an assault one shall recover damages, &c.<sup>1</sup>

<sup>1</sup> Lib. Ass. fol. 134, pl. 11; Y. B. 40 Edw. III. fol. 40, pl. 19; Y. B. 42 Edw. III. fol. 7, pl. 25; Y. B. 45 Edw. III. fol. 24, pl. 35; Y. B. 7 Edw. IV. fol. 24, pl. 31; Y. B. 17 Edw. IV. fol. 4, pl. 2; Y. B. 18 Edw. IV. fol. 28, pl. 24; Y. B. 11 Hen. VII. fol. 20, pl. 4; Smith v. Newsam, 1 Vent. 256; Tombs v. Painter, 13 East, 1; Lewis v. Hoover, 3 Blackf. 407; Handy v. Johnson, 5 Md. 450 Accord. — Ed.

TUBERVILLE *v.* SAVAGE.

IN THE KING'S BENCH, TRINITY TERM, 1669.

[Reported in 1 *Modern Reports*, 3.]

ACTION of assault, battery, and wounding. [The defendant pleaded the plaintiff began first; and the stroke he received, whereby he lost his eye, was on his own assault, and in defence of the defendant.<sup>1</sup>] The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, if that were an assault? The court agreed that it was not; for the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault.<sup>2</sup> Therefore, if one strike another upon the hand or arm or breast, in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

MORTIN *v.* SHOPPEE.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., OCTOBER 27, 1828.

[Reported in 3 *Carrington & Payne*, 373.]

ASSAULT. Plea: General issue. The plaintiff was walking along a foot-path by the roadside at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden; when the defendant rode up to the garden-gate (the plaintiff then being in the garden about three yards from him), and, shaking his whip, said, "Come out, and I will lick you before your own servants."

*Denman*, C. S., objected, that this did not amount to an assault.

LORD TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

*Verdict for the plaintiff. Damages, 40s.*<sup>3</sup>

<sup>1</sup> Taken from the report in 2 *Keb.* 545. — ED.

<sup>2</sup> *Blake v. Barnard*, 9 C. & P. 626; *State v. Crow*, 1 *Ired.* 375; *Commonwealth v. Eyre*, 1 S. & R. 347 *Accord.* — ED.

<sup>3</sup> *State v. Sims*, 3 *Strob.* 137 *Accord.* — ED.

## STEPHENS v. MYERS.

AT NISI PRIUS, CORAM TINDAL, C. J., JULY 17, 1830.

[Reported in 4 Carrington &amp; Payne, 349.]

**ASSAULT.** The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea: Not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman, but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

*Spankie*, Serjt., for the defendant, upon this evidence, contended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat, — there was not a present ability, — he had not the means of executing his intention at the time he was stopped.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

*Verdict for the plaintiff. Damages, 1s.<sup>1</sup>*

<sup>1</sup> Fairme's Case, 5 City Hall Rec. 95 *Accord*.

Compare *Cobbett v. Grey*, 4 Ex. 744, *per* Pollock, C. B.; *People v. Lilley*, 43 Mich. 521. — ED.



## CHRISTOPHERSON v. BARE.

IN THE QUEEN'S BENCH, FEBRUARY 8, 1848.

[Reported in 11 *Queen's Bench Reports*, 473.]

**TRESPASS.** The declaration charged that defendant, to wit, on, &c., assaulted plaintiff, and then imprisoned him, and kept and detained him in prison for a long time, to wit, for the space of one month and twenty-five days, contrary to law, and against the will of plaintiff, and until plaintiff, in order to obtain his release, &c., was forced to and did procure an order of Wightman, J., for his discharge from the said imprisonment. Damage by payment of moneys, &c.

**Plea:** That defendant, at the said several times when, &c., by the leave and license of plaintiff, to him for that purpose first given and granted, committed the trespasses in the declaration mentioned. Verification.

**Demurrer:** As to so much and such part of the plea as relates to the assaulting plaintiff, and imprisoning him, and keeping and detaining him in prison for the space of thirty-three days, part of the said space of one month and twenty-five days, that the same is not sufficient in law. For that the plaintiff's having given leave and license to commit the trespasses cannot in law be a justification of the same. And for that the plea amounts to an argumentative plea of not guilty, and is an argumentative traverse of defendant's having imprisoned plaintiff. And for that the plea ought to have concluded to the country.

Joinder in demurrer.

*O'Malley*, for the plaintiff.

*Pearson*, contra.<sup>1</sup>

**LORD DENMAN, C. J.** We need not decide whether an imprisonment can be confessed and avoided in this way; but, as to the assault, it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission.

**PATTESON, J.** I doubt much as to the imprisonment; but the plea is clearly bad as to the assault, and, if bad for any part, it is bad for all. An assault must be an act done against the will of the party assaulted, and, therefore, it cannot be said that a party has been assaulted by his own permission.

**COLERIDGE, J.** If the plea had been only not guilty, the defendant might have shown that the act was done in the course of sport between the parties, and by the plaintiff's leave. This plea is, therefore, specially demurrable.

**WIGHTMAN, J.** I agree, and for the reasons already given.

*Judgment for plaintiff.*<sup>2</sup>

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> See *Ringham v. Clements*, 12 Q. B. 260, 262. — ED.

## READ v. COKER.

IN THE COMMON PLEAS, JUNE 1, 1853.

[Reported in 13 Common Bench Reports, 850.]

ASSAULT and false imprisonment.<sup>1</sup> The first count charged an assault committed by the defendant on the plaintiff on the 24th of March, 1853, by thrusting him out of a certain workshop.

Plea: Not guilty "by statute," upon which issue was joined.

The cause was tried before Talfourd, J., at the first sitting in London in Easter term last. The facts which appeared in evidence were as follows: The plaintiff was a paper-stainer, carrying on business in the City Road, upon premises which he rented of one Molineux, at a rent of 8s. per week. In January, 1852, the rent being sixteen weeks in arrear, the landlord employed one Holliwell to distrain for it. Holliwell accordingly seized certain presses, lathes, and other trade fixtures, and, at the plaintiff's request, advanced him £16 upon the security of the goods, for the purpose of paying off the rent. The plaintiff, being unable to redeem his goods, on the 23d of February applied to the defendant for assistance. The goods were thereupon sold to the defendant by Holliwell, on the part of Read, for £25 11s. 6d.; and it was agreed between the plaintiff and the defendant that the business should be carried on for their mutual benefit, the defendant paying the rent of the premises and other outgoings, and allowing the plaintiff a certain sum weekly.

The defendant, becoming dissatisfied with the speculation, dismissed the plaintiff on the 22d of March. On the 24th, the plaintiff came to the premises, and, refusing to leave when ordered by the defendant, the latter collected together some of his workmen, who mustered round the plaintiff, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out; and, fearing that the men would strike him if he did not do so, the plaintiff went out. This was the assault complained of in the first count. Upon this evidence the learned judge left it to the jury to say whether there was an intention on the part of the defendant to assault the plaintiff, and whether the plaintiff was apprehensive of personal violence if he did not retire. The jury found for the plaintiff on this count. Damages, one farthing.

*Byles*, Serjt., on a former day in this term, moved for a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. That which was proved as to the first count clearly did not amount to an assault. [JERVIS, C. J. It was as much an assault as a sheriff's officer being in a room with a man against whom he has a writ, and saying to him, "You are my prisoner," is an arrest.] To constitute an assault, there must be something more than a threat of violence. An assault is thus defined in Buller's *Nisi*

<sup>1</sup> Only so much of the case is given as relates to the question of assault.

Prius, p. 15: "An assault is an attempt or offer, by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him [within shooting distance]; drawing a sword, and waving it in a menacing manner, &c. *The Queen v. Ingram*.<sup>1</sup> But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action: 1 Hawk. P. C. 133; as if a man were to lay his hand upon his sword, and say, 'If it were not assize-time, he would not take such language,'—the words would prevent the action from being construed to be an assault, because they show he had no intent to do him any corporal hurt at that time: *Tuberville v. Savage*." So, in Selwyn's *Nisi Prius* (11th ed.), 26, it is said: "An assault is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing manner; striking at another with a cane or stick, though the party striking may miss his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach (*Genner v. Sparks*); or by any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability (see *Stephens v. Myers*), of using actual violence against the person of another." So, in 3 Bl. Comm. 120, an assault is said to be "an attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him: this is an assault, *insultus*, which Finch (L. 202) describes to be 'an unlawful setting upon one's person.'" [JERVIS, C. J. If a man comes into a room, and lays his cane on the table, and says to another, "If you don't go out I will knock you on the head," would not that be an assault?] Clearly not: it is a mere threat, unaccompanied by any gesture or action towards carrying it into effect. The direction of the learned judge as to this point was erroneous. He should have told the jury that to constitute an assault there must be an attempt, coupled with a present ability, to do personal violence to the party; instead of leaving it to them, as he did, to say what the plaintiff thought, and not what they (the jury) thought was the defendant's intention. There must be some act done denoting a present ability and an intention to assault.

A rule *nisi* having been granted,

*Allen*, Serjt., and *Charnock* now showed cause. The first question is, whether the evidence was sufficient, as to the first count, to justify the learned judge in putting it to the jury whether or not the defendant had been guilty of an assault. The evidence was, that the plaintiff was surrounded by the defendant and his men, who, with their sleeves and aprons tucked up, threatened to break his neck if he did not quit the workshop. [MAULE, J. If there can be such a thing as an assault without an actual beating, this is an assault.]

<sup>1</sup> 1 Salk. 384.

JERVIS, C. J. I am of opinion that this rule cannot be made absolute to its full extent; but that, so far as regards the first count of the declaration, it must be discharged. If anything short of actual striking will in law constitute an assault, the facts here clearly showed that the defendant was guilty of an assault. There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

MAULE, J., CRESSWELL, J., and TALFOURD, J., concurring,  
*Rule discharged as to the first count.*<sup>1</sup>

## OSBORN v. VEITCH.

AT NISI PRIUS, CORAM WILLES, J., KENT SUMMER ASSIZES, 1858.

[Reported in 1 *Foster & Finlason*, 317.]

TRESPASS and assault. Pleas: Not guilty, and *son assault demesne*. Issue.

The plaintiffs were owners of a field in which the defendants were walking with loaded guns at half-cock in their hands. The plaintiffs desired them to withdraw and give their names, and on their refusal advanced towards them, apparently as if to apprehend them. The defendants half raised their guns, which they pointed towards them, and threatened to shoot them. The plaintiffs (one of whom was a constable) then gave them in charge to a policeman for shooting with intent, and he, with their assistance, seized and handcuffed them.

*E. James* submitted that there was no assault; as the guns were only at half-cock, there was no "present ability" to execute the threat. Read *v. Coker*.

*Sed per* WILLES, J. Pointing a loaded gun at a person is in law an assault. It is immaterial that it is at half-cock; cocking it is an instantaneous act, and there is a "present ability" of doing the act threatened, for it can be done in an instant.<sup>2</sup>

*E. James*. The assault was in self-defence; the defendants were only trespassers, and there was an attempt to apprehend them, and excess is not even assigned. Broughton *v. Jackson*.<sup>3</sup>

WILLES, J. It was not necessary that it should be. To shoot a man is not a lawful way of repelling an assault. No doubt the charge of shooting with intent was idle,<sup>4</sup> and the assault was only a misdemeanor. The handcuffing was utterly unlawful.

*Verdict for the plaintiff. Damages, one farthing.*

<sup>1</sup> United States *v. Kiernan*, 3 Cranch, C. C. 435; *People v. Lee*, 1 Wheeler, Crim. Cas. 364; *Alexander v. Blodgett*, 44 Vt. 476; *Nowell v. Whitcher*, 53 Vt. 589; *Bishop v. Ranney*, 59 Vt. 316; *Barnes v. Martin*, 15 Wis. 240; *Keap v. Quallman*, 68 Wis. 451 *Accord.* — ED.

<sup>2</sup> *State v. Church*, 63 N. Ca. 15 *Accord.* — ED.

<sup>3</sup> 18 Q. B. 378.

<sup>4</sup> See *Hogg v. Burgess*, 27 L. J. Ex. 218.

## UNITED STATES v. ALLISON RICHARDSON.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF COLUMBIA,  
NOVEMBER TERM, 1837.

[Reported in 5 Cranch, Circuit Court Reports, 348.]

INDICTMENT for an assault upon one Susan Shelton.

The evidence was that the defendant came into the house where Mrs. Shelton was sitting at a window. He was armed with a musket and a club; and raising the club over her head, in an attitude for striking, and within striking distance, said to her that if she said a word (or if she opened her mouth) he would strike her; and this without any provocation on her part.

*Mr. Bradley* and *Mr. Hoban*, for the defendant, contended that this was not, in law, an assault; that there can be no assault without a present intent to strike; and his saying, "if she opened her mouth," showed that he had not such a present intent; and they cited the old case, "if it were not the assizes, I would stab you."

But the COURT (THURSTON, J., absent) said that he had no right to restrain her from speaking; and his language showed an intent to strike upon her violation of a condition which he had no right to impose. Suppose a stranger comes to my house armed, and raises his club over my head, within striking distance, and threatens to beat me unless I will go out of and abandon my house; surely that would be an assault. So, if a highwayman puts a pistol to my breast, and threatens to shoot me unless I give him my money; this would be evidence of an assault, and would be charged as such in the indictment.

*Verdict, guilty; fined ten dollars.*<sup>1</sup>

## BEACH v. HANCOCK.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, DECEMBER  
TERM, 1853.

[Reported in 27 New Hampshire Reports, 223.]

TRESPASS, for an assault.

Upon the general issue it appeared that, the plaintiff and defendant being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being

<sup>1</sup> United States v. Myers, 1 Cranch, C. C. 310; Keefe v. State, 19 Ark. 190; State v. Herron (Mont. 1892), 29 Pac. R. 819; State v. Morgan, 3 Ired. 186; State v. Church, 63 N. Ca. 15 Accord. — ED.

three or four rods distant. The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded.

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.

The court, among other things, instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages in actions for breaches of the peace would have to encourage a disregard of the laws and disturbances of the public peace.

The defendant excepted to these rulings and instructions.

The jury having found a verdict for the plaintiff, the defendant moved for a new trial by reason of said exceptions.

*Morrison and Fitch*, for the defendant. The first question arising in this case is, Is it an assault to point an unloaded gun at a person in a threatening manner? An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. 72. The attempt or offer with violence to do corporal hurt to another must be coupled with a present ability to constitute an assault. Roscoe's Crim. Ev. 287; 1 Russell on Crimes, 750. It is no assault to point an unloaded gun or pistol at another, &c. *Blake v. Barnard*,<sup>1</sup> *Regina v. Baker*,<sup>2</sup> *Regina v. James*.<sup>3</sup> The court erred in instructing the jury that the pointing of a gun in an angry and threatening manner was an assault. It is well settled that the intention to do harm is the essence of an assault, and this intent is to be collected by the jury from the circumstances of the case. 2 Greenl. Ev. 73.

*D. and D. J. Clerk*, for the plaintiff.<sup>4</sup>

GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant to show that the ruling of the court was incorrect. Among them is the case of *Regina v. Baker*.<sup>2</sup> In that case, the prisoner was indicted under the statute of 7 Will. IV. and 1 Vict. c. 85, for attempting to discharge a loaded pistol. Rolfe, B., told the jury that they must consider whether the pistol was in such a state of loading that, under ordinary circumstances, it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also, "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly, in the case where the pistol was loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury."

<sup>1</sup> 9 C. & P. 626.

<sup>2</sup> 1 Car. & K. 254.

<sup>3</sup> 1 Car. & K. 530.

<sup>4</sup> The argument for the plaintiff is omitted. — Ed.

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting a loaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of *Regina v. James*<sup>1</sup> was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. Tindal, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vict. c. 85, and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged." The reason why the prisoner could not be convicted of the assault is given in the case of *Regina v. St. George*,<sup>2</sup> where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault, which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault, which is involved in the felony itself. In this case, Parke, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." So if a person present a pistol purporting to be a loaded pistol at another, and so near as to have been dangerous to life if the pistol had gone off; *semble*, that this is an assault, even though the pistol were, in fact, not loaded. *Ibid*.

In the case of *Blake v. Barnard*,<sup>3</sup> which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord Abinger then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct, under that declaration, for the variance. *Regina v. Oxford*.<sup>4</sup>

One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no

<sup>1</sup> 1 C. & K. 530.

<sup>3</sup> 9 C. & P. 626.

<sup>2</sup> 9 C. & P. 483.

<sup>4</sup> 9 C. & P. 525.

reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace — damages incommensurate with the injury sustained — would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced. *Flanders v. Colby*.<sup>1</sup>

*Judgment on the verdict.*<sup>2</sup>

## STEARNS AND WIFE v. SAMPSON.

SUPREME JUDICIAL COURT, MAINE, 1871.

[*Reported in 59 Maine Reports, 568.*]

ON exceptions, and motion to set aside the verdict as being against law.

Trespass. The writ contained three counts: one for breaking and entering the plaintiffs' close and carrying away the household furniture; the second, for taking and carrying away the household furniture of the wife; and the third,<sup>3</sup> for assault on the wife.

There was evidence tending to show that after entry and notice to leave, and refusal by the wife and her mother, with an expressed determination on their part to hold possession against the defendant, the latter called in assistants and ordered them to remove the furniture, and they did remove it from some of the rooms; that upon going to one of the rooms, the door was fastened, and the assistants opened it; that the furniture, except bed, was removed from Mrs. Stearns' sleeping-room.

That the assistants remained there several days and nights.

That the defendant caused the windows to be removed; prevented food from being carried to the house; that a tenant was let into the L of the house, and had charge of the defendant's bloodhound, five months old, and permitted him to go into the house; that the furniture was removed into a house near by, and Mrs. Stearns notified of its

<sup>1</sup> 23 N. H. 34.

<sup>2</sup> In *Chapman v. State*, 78 Ala. 463; *State v. Sears*, 86 Mo. 169; *State v. Godfrey*, 17 Or. 300; *McKay v. State*, 44 Tex. 43, it was decided that a defendant who aimed an unloaded pistol at another, although perhaps liable for a civil assault, was not guilty of a criminal assault. See also 2 Green, Cr. Cas. 271 n. But there would seem to be no sound basis for such a distinction. Such conduct was, therefore, rightly held to be a criminal assault in *State v. Shepard*, 10 Iowa, 126; *Commonwealth v. White*, 110 Mass. 409; *State v. Smith*, 2 Humph. 457; *Richels v. State*, 1 Sneed, 606 *semble*; *Morison's Case*, 1 Brown, Just. R. (Scotch) 394. In *Commonwealth v. White*, *supra*, Wells, J., said: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted." — Ed.

<sup>3</sup> Only so much of the case is given as relates to this count. — Ed.



whereabouts; that the doors fastened by Mrs. Stearns were removed; that Mrs. Stearns finally left by compulsion with an officer, and was sick several weeks.

The rulings sufficiently appear in the opinion.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, and also filed motions to set aside the verdict as being against law and the weight of evidence.

*J. W. Bradbury* and *L. Clay*, for the plaintiffs.

*A. Libbey*, for the defendant.

APPLETON, C. J. There is in the declaration a count for an assault and battery upon the female plaintiff. In reference to this branch of the case, the following instructions were given: "Was there a trespass committed upon the female plaintiff? She is the only one who seeks for damages. Whatever may have been the injury inflicted upon the other inmates of that house, she can recover on this suit only for that which was inflicted upon her. In order to constitute an assault, it is not necessary that the person should be touched, but there should be certain indignities. In the language of one of the decisions, if the plaintiff was embarrassed and distressed by the acts of the defendant, it would amount in law to an assault." The acts and indignities which from the charge might constitute an assault, were the bursting open a door, which the defendants had no right to fasten, and the inconveniences resulting from taking off the doors and taking out the windows, which made it uncomfortable for the female plaintiff to remain, where remaining, she was a trespasser. So the bringing a bloodhound by the defendant into his house, which is proved to have barked, but not to have bitten, and the making a noise therein, with other similar acts, it was contended, would amount to an assault and trespass, and of that the jury were to judge. Now, such is not the law. An assault and battery is clearly defined by R. S., c. 118, § 28, thus: "Whoever unlawfully attempts to strike, ~~hit~~ touch, or do any violence to another, however small, in a wanton, wilful, angry, or insulting manner, having an intention and existing ability to do some violence to such person, shall be deemed guilty of an assault; and if such attempt is carried into effect, he shall be deemed guilty of an assault and battery." Now, the removal of a door or windows, of the owner in possession, would constitute no assault. Indeed, as has been seen, 6 Allen, 76, the owner would, in attempting it, have the right to use as much force as was necessary to overcome the resistance of the unlawfully resisting and trespassing tenant. Acts which may embarrass and distress do not necessarily amount to an assault. Indignities may not constitute an assault. Acts aggravating an assault differ materially from the assault thereby aggravated. Insulting language or conduct may aggravate an assault, but it is not an assault. So the acts of the defendant in taking out the windows of his own house, in a bleak and cold day, might distress one unlawfully occupying and illegally refusing to quit his premises, but they could in no sense be regarded as an assault upon her.

One may be embarrassed and distressed by acts done "in a wanton, wilful, angry, or insulting manner," where there is no "intention nor existing ability to do some violence" to the person, and yet there be no assault. The instruction on this point is equally at variance with the common law and the statute of the State.<sup>1</sup>

VICTORIAN RAILWAYS COMMISSIONERS, DEFENDANTS; AND  
JAMES COULTAS AND MARY COULTAS, PLAINTIFFS.

IN THE PRIVY COUNCIL, FEB. 4, 1888.

[*Reported in 13 Appeal Cases, 222.*]

THE judgment of their Lordships was delivered by  
SIR RICHARD COUCH:—

The respondents brought a suit against the appellants in the Supreme Court of the colony of Victoria, to recover damages for injuries sustained by the respondent Mary Coultas, through the negligence of a servant of the appellants, and expenses incurred by the respondent James Coultas, her husband, through her illness. The statement of claim stated that, through the negligence of the servant of the defendants in charge of a railway gate at a level crossing, the plaintiffs, while driving over the level crossing, were placed in imminent peril of being killed by a train; and, by reason of the premises, the plaintiff, Mary Coultas, received a severe shock, and suffered personal injuries, and still suffered from delicate health and impaired memory and eyesight. The defendants, by their defence, denied the allegations in the statement of claim, and further said they would contend that no cause of action was disclosed by it, as it was not stated that either the plaintiffs or their property were struck or touched by the train of the defendants; and, further, that the alleged damage arising from shock or fright, without impact, was too remote to sustain the action.

The facts proved at the trial before Mr. Justice Williams, a judge of the Supreme Court, and a jury, were that on or about the 8th of May, 1886, about nine in the evening, the respondents, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of railway from Melbourne to Hawthorn. When they came to it the gates were closed, and the gate-keeper came and opened the gates nearest to them, and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up line (the farther one) when a train was seen approaching on it.

<sup>1</sup> Meader v. Stone, 7 Met. (Mass.) 147 Accord.

See Rex v. Smith, 2 C. & P. 449. — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

The gate-keeper directed them to go back ; but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He got the buggy across the line, so that the train, which was going at a rapid speed, passed close to the back of it, and did not touch it. As the train approached, Mary Coultas fainted, and fell forward in her brother's arms. The medical evidence showed that she received a severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage ; he put down her symptoms to nervous shock.

The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part. And they assessed the male plaintiff's damages at £342 2s., and the female plaintiff's at £400, leave being granted to either side to move for judgment after the full court had decided points reserved. The points reserved were :—

1. Whether the damages awarded by the jury to the plaintiffs, or either of them, are too remote to be recovered?
2. Whether proof of "impact" is necessary in order to entitle plaintiffs to maintain the action?
3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants?

The full court, consisting of Mr. Justice Williams and two other judges, answered that the damages awarded were not too remote to be recovered ; that proof of "impact" was not necessary ; and that the female plaintiff could recover damages for physical and mental injuries occasioned by the fright. Thereupon judgment was entered for the plaintiffs for the amounts awarded, and the present appeal is from that judgment. The defendants did not move for a new trial, and consequently they cannot now contend that there was contributory negligence on the part of the plaintiffs.

The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill*,<sup>1</sup> a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendants' act ; such a consequence as in the ordinary course of things would flow from the act. The law would be the same in Victoria unless it has been otherwise enacted by the legislature, which it is not said it has been.

According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching, and thinking they were going

to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York, which he referred to in support of his contention, was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby v. Lancashire & Yorkshire Railway Company*.<sup>1</sup> It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants. They will therefore humbly advise Her Majesty to reverse the judgment for the plaintiffs, and to order judgment to be entered for the defendants, with the costs of the action and of the argument of the points reserved and the motion for judgment. The respondents will pay the cost of this appeal.

<sup>1</sup> 1 Q. B. D. 42.

<sup>2</sup> *Ewing v. Pittsburg Co.* 147 Pa. 40 *Accord*.

In *Lehman v. Brooklyn Co.*, 47 Hun, 355, the plaintiff would seem to have failed upon the same ground as the plaintiff in the principal case. But the report makes no mention of any negligence on the defendant's part.

In *Bell v. Great Northern Ry. Co.*, L. R. 26 Ir. 428, the Exchequer Division of the Irish High Court of Justice declined to follow the principal case, *Palles, C. B.*, making the following criticism:—

"Amongst the reasons stated in the judgment in support of this conclusion are: 1, that a contrary doctrine would involve damages on account of *mental* injury being given in every case where the accident caused by the negligence had given the person a severe *nervous* shock; 2, that no decision of an English court had been produced in which, upon such facts, damages were recovered; 3, that a decision of the Supreme Court of New York (*Vandenburgh v. Truax*, 4 Denio, Sup. Ct. N. Y. Rep. 464), which was relied upon, was distinguishable, as being a case of *palpable* injury.

"Of these reasons, the first seems to involve that injuries, other than mental, cannot result from nervous shock; and the third implies that injuries resulting from such a shock cannot be 'palpable.' I am unable (I say it with deference) to follow this

reasoning; and, further, it seems to me that even were the proposition of law upon which the judgment is based sustainable, the Privy Council were not warranted in assuming as a fact, against the verdict of the jury, and without any special finding with regard to it, that the fright was, in that particular case, unaccompanied by any actual physical injury. Further, the judgment assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body. This error pervades the entire judgment. Mr. Beven states, in his recent work on Negligence (p. 67), and I entirely concur with him, that 'the starting-point of the reasoning there, is that nervous shock and mental shock are identical, and that they are opposed to actual physical injury.'"

Further criticism of the principal case may be found in Beven, *Negligence*, 66-71; 2 Sedgwick, *Damages*, 8th ed., 642, 643. See *The Corsair*, 145 U. S. 335, 348. The damages for an admitted tort to the person may be enhanced by proof of nervous shock caused by fright induced by the defendant's misconduct. *Shutz v. Chicago Co.*, 73 Wis. 147.

In *Phillips v. Dickerson*, 85 Ill. 11, and *Renner v. Canfield*, 36 Minn. 90, plaintiffs, who were made ill from fright caused by the defendant's act, failed in an action because the defendant had no reason to apprehend any such consequence of his conduct.

THREATS BY LETTER. — An action on the case has been allowed against one who wrote to the plaintiff threatening him with personal violence, and thereby caused him pecuniary damage. *Grimes v. Gates*, 47 Vt. 594. — ED.

## SECTION II.

*Battery.*✓  
COLE v. TURNER.

AT NISI PRIUS, CORAM HOLT, C. J., EASTER TERM, 1704.

[Reported in 6 *Modern Reports*, 149.]

HOLT, C. J., upon evidence in trespass for assault and battery, declared, —

First, That the least touching of another in anger is a battery.

Secondly, If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.<sup>1</sup>

Thirdly, If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery.

## GIBBONS v. PEPPER.

IN THE KING'S BENCH, EASTER TERM, 1695.

[Reported in 1 *Lord Raymond*, 38.]

TRESPASS, assault, and battery. The defendant pleads that he rode upon a horse in the king's highway, and that his horse, being affrighted, ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quæ est eadem transgressio, etc.* The plaintiff demurred. And Serjeant *Darnall*, for the defendant, argued that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*.

*Northey*, for the plaintiff, said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse so that he

<sup>1</sup> Kerifford's Case, Clayt. 22, pl. 38 *Accord.* — ED.

runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not I. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B., and with it strikes C., A., is the trespasser, and not B. And, *per curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.

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### HALL v. FEARNLEY.

IN THE QUEEN'S BENCH, NOVEMBER 28, 1842.

[Reported in 3 Queen's Bench Reports, 919.]

TRESPASS for driving defendant's cart and horse with great violence against plaintiff, and thereby knocking him down, bruising, and wounding him, &c.

Plea: Not guilty.

On the trial before Wightman, J., at the Middlesex sittings in Hilary term, 1842, it was proved that the plaintiff was walking on a narrow part of the pavement in a public street, where there was a considerable curvature in it. The defendant was driving a cart in the road near the pavement, at the edge of which the plaintiff was walking. The case for the plaintiff was that there was want of due care on the part of the defendant, who had driven so close to the pavement as to knock the plaintiff down, and run over and break his leg. The defendant endeavored to show that the plaintiff had slipped from the curb-stone at the moment when the cart was passing, and had so got his leg under the wheel. The defendant called no witnesses. Wightman, J., told the jury that the question for them was, whether the injury was occasioned by unavoidable accident, or by the defendant's default; and that, if they thought the plaintiff had accidentally slipped off the pavement as the defendant's cart was passing, and had been run over in consequence of such accident, they ought to find for the defendant. Verdict for defendant.

In the same term Crowder obtained a rule *nisi* for a new trial on the ground that the judge had misdirected the jury, by telling them that, on the issue, if the injury was accidental, the defendant was entitled to a verdict.

Knowles now showed cause. The jury have in effect negatived all fault on the part of the defendant. This was an inevitable accident, as in *Gibbons v. Pepper*, where the defendant's horse ran away with the rider, and struck the plaintiff, and the court held it to be no trespass, and therefore properly evidence under not guilty. The new rules of pleading make no alteration in pleadings for trespass to the person;

and the case, therefore, stands on the old forms of pleading. This was in fact no assault or battery at all; for to constitute one some degree of negligence is always necessary. 3 Starkie on Evidence, 1119 (3d ed.). Gough v. Bryan<sup>1</sup> is to the same effect. There a special plea, alleging collision by the improper driving of the plaintiff himself, and concluding to the country, was held to be bad as amounting to the general issue. Griffin v. Parsons<sup>2</sup> shows that a seizure of the person is not necessarily an assault, but that the *animus* with which the act was done is material. It is at all events evidence in mitigation. [LORD DENMAN, C. J. If the plaintiff has suffered damage by a trespass not justified, the defendant should pay the whole amount, without inquiry into the question of *animus*. The case would be different if the defendant was not a voluntary agent. So it may be different where an action on the case for negligence is brought, and the negligence is denied; there negligence is the fact in issue.]

*Crowder* (with whom was *H. S. Cooper*), contra.<sup>3</sup>

LORD DENMAN, C. J. The authorities show that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant would not have been so provable.

COLERIDGE, J. Any defence which admits the trespass complained of to be the act of the defendant must be pleaded specially.

WIGHTMAN, J. The act of the defendant was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*. It was there agreed that an involuntary act might be a defence on the general issue. The decision, indeed, turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover.

*Rule absolute for a new trial.*<sup>4</sup>

## HOLMES AND WIFE v. MATHER.

IN THE EXCHEQUER, JUNE 24, 1875.

[Reported in *Law Reports*, 10 *Exchequer*, 261.]

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a

<sup>1</sup> 2 M. & W. 770.

<sup>2</sup> 1 Selw. N. P. (13th ed.) 42.

<sup>3</sup> The argument for the plaintiff is omitted. — ED.

<sup>4</sup> *Knapp v. Salisbury*, 2 Camp. 500; *Boss v. Litton*, 5 C. & P. 409; *Cotterill v. Starkey*, 8 C. & P. 691 *Accord*. — ED.



carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before Field, J., at the spring assizes for Durham, 1875, the following facts were proved: In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses, being startled by a dog which suddenly rushed out and barked at them, ran away, and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace, the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50 on the second count, the court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

*Herschell*, Q. C., having obtained a rule *nisi* to enter the verdict for the plaintiffs for £50, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

*C. Russell*, Q. C., and *Crompton*, for the defendant, showed cause.

*Herschell*, Q. C., and *Gainsford Bruce*, in support of the rule. But for the act of the groom in directing the horses on to the plaintiff, they would have run into the shop, and the plaintiff would have escaped.

The groom may have been doing better for himself and the defendant in avoiding the shop, but that does not justify him in guiding the horse on to the plaintiff. That direction having been given by the immediate act of the driver, an action of trespass lies: *Leame v. Bray*.<sup>1</sup> There the defendant accidentally, and not wilfully, drove his carriage against the plaintiff's carriage, and the question being whether the proper remedy was trespass or case, it was held that the plaintiff had rightly brought trespass. Grose, J., said: "Looking into all the cases from the Year Book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lord Ellenborough says: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." This was followed and approved in *M'Laughlin v. Pryor*.<sup>2</sup> It is not disputed that the groom was doing all he could to stop the horses, but as he still retained some control over them, the injury was the immediate result of his act. Herein lies the distinction between the present case and *Hammack v. White*,<sup>3</sup> where the defendant had no control whatever over the horse, and did all in his power to prevent him going where he did. Here the driver exercised control so far as to pull them away from one direction into another, which took them on to the plaintiff.

[BRAMWELL, B. He was trying to divert them from that direction, but failed. It is not as if he had said, "I must either drive into the shop or on to the plaintiff, and I'll do the latter."]

In *Hammack v. White*<sup>3</sup> there was no count in trespass, and the present point was not taken.\*

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavors to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye, and so injured

<sup>1</sup> 3 East, 593, 599.

<sup>2</sup> 4 Man. & G. 48.

<sup>3</sup> 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.

\* The argument for the plaintiff is abridged, and the argument for the defendant is omitted. — Ed.

it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff, — he drove them there. It is true that he endeavored to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, you cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavoring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother Pollock during the argument is irresistible, that if Mr. Herschell's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper

form of action if it were wrongful. That is the effect of the decisions. In *Sharrod v. London and North Western Ry. Co.*,<sup>1</sup> the master was not present. In *M'Laughlin v. Pryor* <sup>2</sup> the defendant was present, and was supposed to be taking part in the control of the animals. In *Leame v. Bray* <sup>3</sup> there was an act of direct force *vi et armis*, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.

CLEASBY, B. I would only add a word as to a point on which my Brother Bramwell has not given judgment, and that is this. This is not a case where the act that is done must be justified, as where a man does a particular thing to avoid something else, but it is a case where it must be shown that it was the act of the defendant himself. I sum up all in these words: in my opinion, the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

I want to say one other word. In my opinion it is not clear that the act was the act of the master. To obtain a true test, we must look at all the circumstances, and particularly at the position of things where persons are placed in a peculiar situation of danger. Here I understand the case to be this: the master not having the same capacity for managing the horses, and being perhaps alarmed and anxious to interfere, the servant says, "Leave it to me, do not take any part." The master complies. That would absolve him as far as any question of personal negligence is concerned; and at that moment I think the act of the servant ceased to be the act of the master. I think, in support of that, I need only read this passage from the judgment of Parke, B., in *Sharrod v. London and North Western Ry. Co.*,<sup>4</sup> where he says: "In all cases where a master gives the direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent, — no more."

POLLOCK, B., concurred.

*Rule discharged.*<sup>5</sup>

<sup>1</sup> 4 Ex. 580.

<sup>2</sup> 4 Man. & G. 48.

<sup>3</sup> 3 East, 593, 599.

<sup>4</sup> 4 Ex., at p. 586.

<sup>5</sup> *Steudle v. Rentchler*, 64 Ill. 161; *Vincent v. Stinehour*, 7 Vt. 62 *Accord*.

See, to the same effect, *Davis v. Saunders*, 2 Chitty, 639; *Goodman v. Taylor*, 5 C. & P. 410, where the actions were for injuries to personal property. — *Ed.*

# INNES v. WYLIE.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., FEBRUARY 22, 1844.

[Reported in 1 Carrington & Kirwan, 257.]

ASSAULT. Plea :<sup>1</sup> Not guilty.

It further appeared that the plaintiff, on the 30th of November, 1843, went to a dinner of the society at Radley's Hotel, and was prevented by a policeman named Douglas from entering the room; and it was proved by the policeman that he acted by order of the defendants.

With respect to the alleged assault, the policeman said, "The plaintiff tried to push by me into the room, and I prevented him;" but some of the other witnesses stated that the plaintiff tried to enter the room, and was pushed back.

*Erle* addressed the jury for the defendant. There is no assault here. The policeman, who must best know what was done, says that the plaintiff tried to push into the room, and he prevented him; and preventing a person from pushing into a room is no assault, the assault, if any, being rather on the other side.

LORD DENMAN, C. J. (in summing up). You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive, like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, Did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door-way passive, and not move at all?

*Verdict for the plaintiff. Damages, 40s.*

# COWARD v. BADDELEY.

IN THE EXCHEQUER, APRIL 19, 1859.

[Reported in 4 Hurlstone & Norman, 478.]

DECLARATION : That the defendant assaulted and beat the plaintiff, gave him in custody to a policeman, and caused him to be imprisoned in a police-station for twenty-four hours, and afterwards to be taken in custody along public streets before metropolitan police magistrates.

Pleas : First, Not guilty; third, That the plaintiff, within the Metropolitan Police District, assaulted the defendant, and therefore the defendant gave the plaintiff into custody to a police officer, who had

<sup>1</sup> The statement of the case has been abridged. — ED.

view of the assault, in order that he might be taken before magistrates and dealt with according to law, &c.

Whereupon issue was joined.

At the trial before Bramwell, B., at the London sittings in last Hilary term, the plaintiff proved that, on the night of the 31st of October, he was passing through High Street, Islington, and stopped to look at a house which was on fire. (The defendant was directing a stream of water from the hose of an engine on the fire. The plaintiff said, "Don't you see you are spreading the flames? Why don't you pump on the next house?" He went away, and then came back and repeated these words several times, but did not touch the defendant. The defendant charged the plaintiff with assaulting him, and gave him into the custody of a policeman who was standing near.)

The defendant swore that, on being interrupted by the plaintiff, he told him to get out of the way and mind his own business; that the plaintiff came up to him again, seized him by the shoulder, violently turned him round, exposed him to danger, and turned the water off the fire.

The learned judge told the jury (that the question was whether an assault and battery had been committed; and he asked them, first, whether the plaintiff laid hands on the defendant; and, secondly, whether he did so hostilely.) The jury found that the plaintiff did lay hands on the defendant, intending to attract his attention. Whereupon the learned judge ordered the verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that he had wrongly directed the jury in telling them that, to find the issue on the third plea for the defendant, they must find that the plaintiff laid his hands upon him with a hostile intention.

*Shee*, Serjt., in the same term, having obtained a rule *nisi* accordingly,

*Beasley* now showed cause. The question is, whether the intention of the plaintiff is material to be considered in order to determine whether there was an assault and battery. In *Rawlings v. Till*,<sup>1</sup> Parke, B., referring to *Wiffin v. Kincard*,<sup>2</sup> where it was held that a touch given by a constable's staff does not constitute a battery, pointed out, as the ground of that decision, that there the touch was merely to engage the plaintiff's attention. [MARTIN, B. Suppose two persons were walking near each other, and one turned round, and in so doing struck the other: surely that would not be a battery. POLLOCK, C. B. There may be a distinction for civil and criminal purposes. CHANNELL, B. It was necessary to prove an indictable assault and battery in order to sustain the plea.] The maxim, *Actus non facit reum nisi mens sit rea*, applies. He referred also to *Purcell v. Horn*; <sup>3</sup> Archbold's Criminal Law, p. 524 (12th ed.); *Scott v. Shepherd*.<sup>4</sup>

<sup>1</sup> 3 M. & W. 28.

<sup>2</sup> 2 B. & P. N. R. 411.

<sup>3</sup> 8 A. & E. 602.

<sup>4</sup> 2 W. Bl. 892.

*Petersdorff*, Serjt., and *Francis*, in support of the rule. The learned judge's direction was defective in introducing the word "hostile." (In order to constitute an assault, it is enough if the act be done against the will of the party.) There are several cases where it has been held that an assault has been committed where there was no intention to do the act complained of in a hostile way, as in the case of a prize-fight. *Rex v. Perkins*.<sup>1</sup> So a surgeon assisting a female patient to remove a portion of her dress. *Rex v. Rosinski*.<sup>2</sup> Here the plaintiff interfered with the defendant in the execution of his duty. In *Hawkins' Pleas of the Crown*, vol. i. p. 263, it is said, "Any injury whatever, be it never so small, being actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." [BRAMWELL, B. I think that the jostling spoken of must mean a voluntary jostling.]

POLLOCK, C. B. I am of opinion that the rule must be discharged. The jury found that what the plaintiff did was done with the intent to attract the attention of the defendant, not with violence to justify giving the plaintiff into custody for an assault. The defendant treated it as a criminal act, and gave the plaintiff into custody. We are called on to set aside a verdict for the plaintiff, on the ground that he touched the defendant. There is no foundation for the application.

MARTIN, B. I am of the same opinion. The assault and battery which the defendant was bound to establish means such an assault as would justify the putting in force the criminal law for the purpose of bringing the plaintiff to justice. It is necessary to show some act which justified the interference of the police officer. Touching a person so as merely to call his attention, whether the subject of a civil action or not, is not the ground of criminal proceeding. It is clear that it is no battery within the definition given by *Hawkins*.

CHANNELL, B. I am of the same opinion. Looking at the plea, it is obvious that it was not proved.

BRAMWELL, B., concurred.

*Rule discharged.*

<sup>1</sup> 4 C. & P. 537.

<sup>2</sup> Ry. & Moo. C. C. 19.

## ORIGINAL WRIT.

[*Registrum Brevium, folio 108, b.*]

OSTENSURUS quare vi et armis quendam liquorem callidum super ipsum I apud N projecit, ita quod de vita ejus desperabatur et alia enormia, etc., ad grave damnum, etc. Casus erat hujusmodi præcedentis brevis: quædam mulier projecit super aliam mulierem ydromellum quod Anglice dicitur *Wort* quod erat nimis callidum.<sup>1</sup>

## DUBUC DE MARENTILLE v. JAMES OLIVER.

IN THE SUPREME COURT, NEW JERSEY, FEBRUARY TERM, 1808.

[*Reported in 1 Pennington, 379.*]

THIS was action of trespass, brought by the defendant in this court, against the plaintiff *in certiorari*. The state of demand charged the defendant below, that he unlawfully, forcibly, and with great violence, with a large stick, struck the horse of the plaintiff, on the public highway, which said horse was then before a carriage, in which the plaintiff was riding, on the said public highway, to the damage of the plaintiff fifty dollars. This cause was tried by a jury, and verdict and judgment for the plaintiff, \$15 damages. It was assigned for error that the suit was brought before the justice to recover damages for an assault and battery, when, by law, such an action cannot be supported before a justice of the peace.

PENNINGTON, J.<sup>2</sup> To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person;<sup>3</sup> and if so, the justice had no jurisdiction of the action.

<sup>1</sup> Pursell v. Horn, 8 A. & E. 602, 3 Nev. & P. 564; Munter v. Bande, 1 Mo. Ap. 484 *Accord.* Lord Denman said in the former case, p. 506: "I think a battery cannot mean merely an injury inflicted by an instrument held in the hand, *cominus*, as it were, but includes all cases where a party is struck by any missile thrown by another." Littledale said in the same case: "Unless we were to hold that throwing boiling water on a person is not a battery, the wounding a person with a ball from a pistol, under circumstances not amounting to a felony, would not be a battery." — ED.

<sup>2</sup> A part of the case, relating to a point of practice, is omitted. — ED.

<sup>3</sup> Dodwell v. Burford, 1 Mod. 24; Hopper v. Reeve, 7 Taunt. 698; Spear v. Chapman, 8 Ir. L. R. 461; Burdick v. Worrall, 4 Barb. 596 (*semble*); Bull v. Colton, 22 Barb. 94; Clark v. Downing, 55 Vt. 259 *Accord.* But see Kirland v. State, 43 Ind. 146.

An injury to the clothes on one's back is a trespass to the person, Regina v. Day, 1 Cox, C. C. 207. So is the removal of an ulster from the plaintiff, Geraty v. Stern, 30 Hun, 426; or striking a cane in the plaintiff's hand, Respublica v. De Longchamps, 1 Dall. 111; or cutting a rope connecting the plaintiff with his slave, State v. Davis, 1 Hill, S. Ca. 46. — ED.



But if this is to be considered as a trespass on the property, unconnected with an assault on the person, I think that it was incumbent on the plaintiff below to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him, or the like.<sup>1</sup> All the precedents of declarations for injuries done to domestic animals, as far as my recollection goes, are in that way; and I think, with good reason. Suppose a man, seeing a stranger's horse in the street, was to strike him with a whip, or a large stick, if you please, and no injury was to ensue, could the owner of the horse maintain an action for this act? I apprehend not. For these reasons, I incline to think, that this judgment ought to be reversed.

KIRKPATRICK, C. J. Concurred in the reversal.

*Judgment reversed.*

*M. Williamson*, for plaintiff.

## THE LORD DERBY.

IN THE UNITED STATES CIRCUIT COURT, EASTERN DISTRICT, LOUISIANA,  
JUNE, 1883.

[Reported in 17 Federal Reporter, 265.]

### ADMIRALTY Appeal.

The libellant, a pilot, was taken on board the steamship at the mouth of the Mississippi river, and while on the voyage up the river to New Orleans he was very seriously bitten by a dog, which had been brought from Europe for sale in this country, and which was kept in the cabin, chained under the table. This suit was brought against the vessel *in rem* for damages suffered thereby by the libellant.

*E. Howard McCaleb*, for libellant.

*J. Carroll Payne* and *Henry Denis*, for claimants.

PARDEE, J. The questions presented in this case are: First, Is the proceeding properly brought against the ship?<sup>2</sup>

1. It is contended that the case, as presented in the libel, shows a case of assault and battery, which, under the sixteenth admiralty rule, "shall be *in personam* only." The ingenuity which suggested the point has not failed to supply the court with an ingenious argument to support it. This definition is given of assault and battery, as taken from *Leame v. Bray*.<sup>3</sup> "Whenever one wilfully or *negligently* puts in motion a force, the direct result of which is an injury, it constitutes

<sup>1</sup> See *infra*.

<sup>2</sup> Only so much of the case is given as relates to the question. — ED.

<sup>3</sup> 3 East, 593.

an assault and battery, and the action brought should be trespass *vi et armis*."

An examination of the case shows that the brief goes further than the authority cited. The question before the court was whether the action was properly brought in trespass, and all the judges agreed that where an injury results directly from force, trespass lies; but nothing is said of assault and battery. The other cases cited (*Gibbons v. Pepper*, *Blackman v. Simmons*<sup>1</sup>), are also cases of trespass. (An assault and battery is where one intentionally inflicts unlawful violence upon another; and if there is a case in the books which goes further than this, it is an unsafe case to follow.) That there may be such gross negligence that an intent to injure may be inferred therefrom, may be conceded, and perhaps *Blackman v. Simmons*, *supra*, shows such gross negligence; (but the case made by the libel does not show such negligence, nor does it bring such negligence home to any particular individual, as would be necessary in a case of assault and battery.)

In my opinion the case made in the libel is very far from a case of "assaulting and beating," within the sixteenth admiralty rule. And the case, as disclosed by the evidence, seems to me to be a clear case of liability on the part of the ship. The dog inflicting the injuries on libellant was brought over on the ship, with the consent of the master and owners, to be disposed of in this port. It was part of the cargo. The libellant was lawfully on board as pilot, and entitled to be carried safely. An injury to him from carelessness, or negligence in handling or caring for the dog, would entitle him to remuneration from the ship the same as if his injuries had resulted from goods falling on him, or from defective spars or rigging.

A decree will be entered for the libellant in the same terms as in the court below.

<sup>1</sup> 3 Car. & P. 133.

## SECTION III.

*Imprisonment.*

NOTE BY THORPE, C. J., 1348.

[Reported in *Year-Book of Assizes*, folio 104, placitum 85.]

THERE is said to be an imprisonment in any case where one is arrested by force and against his will, although it be on the high street or elsewhere, and not in a house, &c.<sup>1</sup>

GENNER *v.* SPARKES.

IN THE KING'S BENCH, TRINITY TERM, 1704.

[Reported in 1 *Salkeld*, 79.<sup>2</sup>]

GENNER, a bailiff, having a warrant against Sparkes, went to him in his yard, and, being at some distance, told him he had a warrant, and said he arrested him. Sparkes, having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. *Et per Curiam*. The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest,<sup>3</sup> and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy, but an action for the assault; for the holding up of the fork at him when he was within reach, is good evidence of that.<sup>4</sup>

<sup>1</sup> McNay *v.* Stratton, 9 Ill. Ap. 215; Price *v.* Bailey, 66 Ill. 49; Hildebrand *v.* McCrum, 101 Ind. 61; Smith *v.* State, 7 Humph. 43; Sorenson *v.* Dundas, 50 Wis. 335 *Accord*.

Compare Marshall *v.* Heller, 55 Wis. 392. — Ed.

<sup>2</sup> 6 Mod. 173, s. c. — Ed.

<sup>3</sup> Anon. 1 Vent. 306; Anon. 7 Mod. 8; Whitehead *v.* Keyes, 3 All. 495 *Accord*. — Ed.

<sup>4</sup> If the bailiff, who has a process against one, says to him when he is on horseback or in a coach, "You are my prisoner; I have a writ against you," upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff laid hold of him. Horner *v.* Battyn, Bull. N. P. 62.

## RUSSEN v. LUCAS.

AT NISI PRIUS, CORAM ABBOTT, C. J., FEBRUARY 19, 1824.

*[Reported in 1 Carrington & Payne, 153.]*

ACTION against the sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun Tavern in Jermyn Street, where Hamer was sitting. He said: "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABBOTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete; but, on these facts, if I had been applied to for an escape-warrant, I would not have granted it.

*Nonsuit.*<sup>1</sup>

## WOOD v. LANE AND ANOTHER.

AT NISI PRIUS, CORAM TINDAL, C. J., DECEMBER 13, 1834.

*[Reported in 6 Carrington & Payne, 774.]*

TRESPASS and false imprisonment. Pleas: Not guilty; and leave and license.

It was proved by a member of the plaintiff's family that he was a flannel draper in Castle Street, Holborn, and that on the 3d of April he came home accompanied by the defendants, Cleaton and Lane; and that the plaintiff said Cleaton had arrested him at Mr. Sanders's, in Holborn; that the plaintiff's wife asked the defendant Lane, who was, in fact, clerk to Cleaton's attorney, if he had any authority, and he said he had; and being asked his name, said, "My name is Selby, of Chancery Lane." Lane made several inquiries about the plaintiff's property, and said he would give him time till eight o'clock in the evening; upon which the other defendant, Cleaton, said, "How can you do that? I will not allow you to give him any time at all." It was proved that, in fact, Mr. Selby had no bailable process against the plaintiff. A witness was also called, who proved that, in conversation with the defendant Lane on the subject, he said it was a foolish piece

<sup>1</sup> Hill v. Taylor, 50 Mich. 549 Accord. — Ed.

of business; that Mr. Cleaton had caused him to do it; that he was very sorry for it, but he thought Mr. Cleaton would indemnify him. There was some uncertainty in the evidence of the conversation, whether the defendant Lane admitted or not that he had taken the plaintiff by the arm.

According to the evidence of Mr. Sanders, at whose house the transaction commenced, the plaintiff was bargaining with him for the sale of some goods, and had just made out the invoice, which was lying before him, when the defendant Cleaton came in alone, and asked the plaintiff several times to pay the amount he owed him, or some money on account. The plaintiff said he would not; upon which Cleaton went just outside the door, and returned immediately, followed by the defendant Lane, and pointing to the plaintiff, said, "This is the gentleman." The plaintiff tore up the invoice he had written, and threw it on the fire, and said, "I suppose I am to go with you." The answer given was, "Yes." The plaintiff and the two defendants went away together.

*Talfourd*, Serjt., for the defendant. No arrest has been proved. Sanders, who was present, says nothing of the laying hold of the plaintiff.

TINDAL, C. J. The question is, whether the plaintiff went voluntarily from Mr. Sanders's to his own house, or whether he went in consequence of the acts of the defendants. If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you to have the power to enforce him, is not that an arrest? May you not arrest without touching a man?

*White* referred to the case of *Arrowsmith v. Le Mesurier*.<sup>1</sup>

TINDAL, C. J. That is a case which has often been spoken of as going to the very extreme point; but in that case the jury found that the plaintiff went voluntarily with the officer. And in this case, if you can persuade the jury that the plaintiff went voluntarily, you may succeed.

*Talfourd*, Serjt., then addressed the jury for the defendants. There was no real compulsion. No writ was produced. It was only an endeavor by a manœuvre to make the plaintiff do what he ought, but would not, viz., pay the money which he owed. It was a sudden thought which struck the attorney's clerk, and it is not a case for damages.

TINDAL, C. J., in summing up, told the jury, that, if the plaintiff was acting as an unwilling agent at the time and against his own will, when he went to his own house from that of Sanders, it was just as much an arrest as if the defendants had forced him along.

*The jury found for the plaintiff. Damages, £10.*<sup>2</sup>

<sup>1</sup> 2 B. & P. N. R. 44.

<sup>2</sup> *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, Ry. & M. 321; *Peters v. Stanway*, 6 C. & P. 737; *Grainger v. Hill*, 4 B. N. C. 212; *Warner v. Riddiford*, 4 C. B. N. S. 180 (criticising *Arrowsmith v. Le Mesurier*, 2 B. & P. N. R. 211) *Accord.* — ED.

## PIKE v. HANSON.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, DECEMBER TERM, 1838.

[Reported in 9 *New Hampshire Reports*, 491.]

TRESPASS, for an assault and false imprisonment on the 1st day of July, A. D. 1837. The action was commenced before a justice of the peace. The defendants pleaded severally the general issue. It appeared in evidence that the defendants were selectmen of the town of Madbury for the year 1836; that they assessed a list of taxes upon the inhabitants of said town, among whom was the plaintiff, and committed it to Nathan Brown, collector of said town, for collection. Brown, after having given due notice to the plaintiff, being in a room with her, called upon her to pay the tax, which she declined doing until arrested. He then told her that he arrested her, but did not lay his hand upon her; and thereupon she paid the tax.

Upon this evidence the defendants objected that the action could not be maintained, because there was no assault.

It did not appear that the defendants had been sworn, as directed by the statute of January 4, 1833. A verdict was taken for the plaintiff, subject to the opinion of the court.

*Hale*, for the plaintiff. —, for the defendants.

WILCOX, J. . . <sup>1</sup> But it is contended that in the present case there has been no assault committed, and no false imprisonment. Bare words will not make an arrest: there must be an actual touching of the body; or, what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto. *Genner v. Sparkes*. Where a bailiff, having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him. But if, on the bailiff's saying those words, he had fled, it had been no arrest, unless the bailiff had laid hold of him. *Homer v. Battyn*.<sup>2</sup> The same doctrine is held in other cases. *Russen v. Lucas & al.*; *Chinn v. Morris*; <sup>3</sup> *Pocock v. Moore*; <sup>4</sup> *Strout v. Gooch*; <sup>5</sup> *Gold v. Bissell*.<sup>6</sup>

Where, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and without compulsion attended the constable who had the warrant to the magistrate, it was held there was no sufficient imprisonment to support an action. *Arrowsmith v. Le Mesurier*.<sup>7</sup> But in this case there was no declaration of any arrest, and the warrant was in fact used only as a summons. And if the decision cannot be

<sup>1</sup> Part of the case, not relating to imprisonment, has been omitted. — Ed.

<sup>2</sup> Buller's N. P. 62.

<sup>3</sup> 2 C. & P. 361.

<sup>4</sup> Ry. & Moody, 321.

<sup>5</sup> 8 Greenl. 126.

<sup>6</sup> 1 Wend. 210.

<sup>7</sup> 2 B. & P. N. R. 211.

sustained upon this distinction, it must be regarded as of doubtful authority.

Starkie says that in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting, until actual violence be used. 3 Stark. Ev. 1113. This principle is reasonable in itself, and is fully sustained by the authorities above cited. Nor does it seem necessary that there should be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant; has the party in his presence and power: if the party so understands it, and in consequence thereof submits, and the officer, in execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, we think it is in law an arrest, although he did not touch any part of the body.

In the case at bar, it clearly appears that the plaintiff did not intend to pay the tax, unless compelled by an arrest of her person. The collector was so informed. He then proceeded to enforce the collection of the tax,—declared that he arrested her,—and she, under that restraint, paid the money. This is a sufficient arrest and imprisonment to sustain the action, and there must, therefore, be

*Judgment on the verdict.*<sup>1</sup>

## 'FOTHERINGHAM v. ADAMS EXPRESS CO.

IN THE UNITED STATES CIRCUIT COURT, EASTERN DISTRICT,  
MISSOURI, SEPTEMBER 24, 1888.

[Reported in 36 Federal Reporter, 252.]

THAYER, J.<sup>2</sup> With reference to the motion for a new trial which has been filed in this case and duly considered, it will suffice to say, that I entertain no doubt that the jury were warranted in finding that plaintiff was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed

<sup>1</sup> Johnson v. Tomkins, Baldw. C. C. 571, 601; Collins v. Fowler, 10 Ala. 859; Courtoy v. Dozier, 20 Ga. 369; Hawk v. Ridgway, 33 Ill. 473; Brushaber v. Stegemann, 22 Mich. 266; Josselyn v. McAllister, 25 Mich. 45; Moore v. Thompson (Mich. 1892), 52 N. W. R. 1000; Ahern v. Collins, 39 Mo. 145; Strout v. Gooch, 8 Greenl. 126; Mowry v. Chase, 100 Mass. 79; Emery v. Chesley, 18 N. H. 198; Browning v. Rittenhouse, 40 N. J. 230; Gold v. Bissell, 1 Wend. 210; Van Voorhees v. Leonard, 1 N. Y. Supreme Ct. R. 148; Searls v. Viets, 2 N. Y. Supreme Ct. R. 224; Huntington v. Shultz, Harp. 452; Mead v. Young, 2 Dev. & Batt. 521; Haskins v. Young, 2 Dev. & Batt. 527; Jones v. Jones, 13 Ired. 448; McCracken v. Ansley, 4 Strob. 1 Accord. — Ed.

<sup>2</sup> A portion of the case, relating to damages, is omitted. — Ed.

that during that period he was constantly guarded by detectives employed by defendant for that purpose ; that he was at no time free to come and go as he pleased ; that his movements were at all times subject to the control and direction of those who had him in charge ; that he was urged by them on several occasions to confess his guilt, and make known his confederates ; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found (as they were warranted in doing) that during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without a warrant. It is manifest that the court ought not to disturb the finding on that issue.

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HERRING v. BOYLE.

IN THE EXCHEQUER, TRINITY TERM, 1834.

[*Reported in 1 Crompton, Meeson, & Roscoe, 377.*]

BOLLAND, B.<sup>1</sup> This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these : The plaintiff had been placed by his mother at the school kept by the defendant, and it appeared that she had applied to take him away. The schoolmaster very improperly refused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the judge's notes that there was any evidence of a trespass to go to the jury. I am of opinion that there was not, and, consequently, that this rule must be discharged. It has been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I cannot find anything upon the notes of the learned judge which shows that the plaintiff was at all cognizant of any restraint. There are many cases which show that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person ; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested ; but in the present case, as far as we know, the boy may have been willing to stay ; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother,

<sup>1</sup> Only the opinions of the judges are given. — Ed.



in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and, therefore, I am of opinion that the rule must be discharged.

ALDERSON, B. There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment. My brother Parke, who heard the rule moved, but who was not present at the argument, concurs in the opinion of the court.

GURNEY, B. This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that anything passed between the plaintiff and defendant which showed that there was any compulsion upon the boy; and there was nothing to show that he was conscious that he was in any respect restrained.

LORD LYNTHURST stated that he was present when the rule was moved, though he did not hear the case argued, and that he concurred in the judgment.

*Rule discharged.*<sup>1</sup>

## / BIRD v. JONES.

IN THE QUEEN'S BENCH, TRINITY VACATION, 1845.

[Reported in 7 Queen's Bench Reports, 742.]

THIS action was tried before Lord Denman, C. J., at the Middlesex sittings after Michaelmas term, 1843, when a verdict was found for the plaintiff.

In Hilary term, 1844, Thesiger obtained a rule *nisi* for a new trial, on the ground of misdirection.

In Trinity term, in the same year (June 5), Platt, Humfrey, and Hance showed cause,\* and Sir F. Thesiger, Solicitor-General, supported the rule.

The judgments sufficiently explain the nature of the case.

*Cur. adv. vult.*

In this vacation (9th July), there being a difference of opinion on the bench, the learned judges who heard the argument delivered judgment *seriatim*.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my

<sup>1</sup> See *Commonwealth v. Nickerson*, 5 All. 518. — ED.

Brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:—

A part of a public highway was inclosed, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and during that time remained where he had thus placed himself.

These are the facts; and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure; and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of

this power: it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; Cro. Car. 209. But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d,<sup>1</sup> *in priso**na*, and says: "Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison." The passage in Cro. Car. 209, is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate-house Prison, to which they had been committed by the king. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate-house. The occasion is somewhat singularly expressed in the decision of the court, which was "that their voluntary retirement to the close stool" in the Gate-house "made them to be prisoners." The resolution, however, in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge, and I am unwilling to put any extreme case hypothetically; but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison, and yet, as obviously, none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly

<sup>1</sup> 1 Stat. 13 Ed. I. c. 48.

contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.<sup>1</sup>

LORD DENMAN, C. J. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of the one line and into the other.

There is some difficulty, perhaps, in defining imprisonment in the abstract without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's *Nisi Prius*, p. 22, it is said: "Every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person: a locking up would constitute an imprisonment, without touching. From the language of Thorpe, C. J., which Mr. Selwyn cites from the Book of Assizes, it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment.

I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.

It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprison-

<sup>1</sup> The concurring opinions of Williams and Patteson, JJ., are omitted. — Ed.

ment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned, because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs should suffer by delay?

It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him. Yet he did not prevent his escaping in another direction.

It is said that if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous: it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

*Rule absolute.*<sup>1</sup>

## ○/ELIZABETH A. PAYSON v. PERRY R. MACOMBER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1861.

[Reported in 3 Allen, 69.]

CHAPMAN, J. The third<sup>2</sup> count is for abduction and false imprisonment. It would have been difficult to sustain this count if it had been demurred to. Its allegations are, in substance, that the defendant, by false and fraudulent representations, procured the plaintiff secretly to remove, so that she could not be procured to testify in a prosecution against Pulsifer for criminal connection with her, and threatened her with exposure and a criminal prosecution if she should return; and by threats detained her for a great length of time illegally and against her will, and abducted her from her home against her consent.

<sup>1</sup> Wright v. Wilson, 1 Ld. Raym. 739 Accord.

See Hawk v. Ridgway, 33 Ill. 473. — ED.

<sup>2</sup> Only so much of the case as relates to this count is given. — ED.

The evidence tended to show that, by representations and threats of prosecution, and by paying her expenses, the defendant induced her to go to Salem and remain there for a while ; and that she became satisfied he was deceiving her, and then returned and testified in the cause, which was a suit for divorce in favor of Mrs. Pulsifer against her husband. But it did not tend to show that the defendant used force or threats of force, and without this the plaintiff has no cause of action. It is at most a case where she yielded voluntarily to the defendant's misrepresentations and threats of a criminal prosecution against her, and absented herself from court and from her home for a time.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> See *State v. Lunsford*, 81 N. C. 528, for an instance of a practical joke not amounting to an imprisonment. — Ed.

## SECTION IV.

*Trespass upon Real Property.*

## SMITH v. STONE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1647.

[Reported in *Style*, 65.]

SMITH brought an action of trespass against Stone, *pedibus ambulando*. The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of others, and was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea. In this case, ROLL, J., said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattle into another man's land is the trespasser against him, and not I, who am owner of the cattle.

## PICKERING v. RUDD.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., JUNE 20, 1815.

[Reported in 1 *Starkie*, 56.]

DECLARATION for breaking and entering the plaintiff's close; for setting up, putting up, hanging, and placing a certain show-board in and upon and over the land of the plaintiff, and for breaking, lopping, and damaging a tree there growing. Plea, the General Issue; and as to the tree, the defendant pleaded that it was unlawfully spreading over a certain messuage of the defendant's adjoining to the *locus in quo*, and that because it was an incumbrance to his premises, therefore, &c., doing no unnecessary damage. Replication that the defendant of his own wrong, &c., and with greater force and violence than was necessary, and with greater damage to the said tree than was necessary, &c., on which issue was joined.

It appeared, that the house of the defendant adjoined to the garden of the plaintiff, which was behind his house in Bernard Street, and that a Virginian creeper which grew in the plaintiff's garden, spread itself over the side of the defendant's house, and was very ornamental to the prospect from the plaintiff's house. The defendant, a hair-cutter, wishing to hang up a show-board on that side of his house, which was

overspread by the Virginian creeper, managed by means of ropes and a scaffolding suspended over the garden, without touching the surface of the plaintiff's premises, to cut away such a portion of the creeper as was sufficient to admit the show-board, and affixed the board to his own house, projecting from three to four inches from the surface of the wall.

It was contended for the plaintiff that the putting up of the board, which projected three or four inches from the defendants' wall, over the garden of the plaintiff, was of itself a trespass, and this had not been justified.

LORD ELLENBOROUGH. You must prove that the projection is a trespass; it may be a very nice question. I recollect a case, where I held that firing a gun loaded with shot into a field was a breaking of the close.<sup>1</sup> The learned judge on the circuit with me doubted upon the point, but many with whom I afterwards conversed on the subject thought I was right; and the judge himself, who at first differed from me, was afterwards of the same opinion; but I never yet heard, that firing *in vacuo* could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained; but it may be questionable, whether an action on the case would not be the proper form. Would trespass lie for passing through the air in a balloon over the land of another?<sup>2</sup>

The *Attorney-General* and *Richardson* contended that the dropping of rain from the projecting board upon the garden of the plaintiff was an inconvenience which entitled him to an action; and that if the projection was not a trespass, it would be no trespass to cover the whole extent of the garden.

LORD ELLENBOROUGH. Undoubtedly an action would be maintainable in that case for obstructing the light; but it is another question whether an action of trespass lies for interfering with the column of air incumbent on the land.<sup>3</sup>

It afterwards turned out that the board did not extend beyond the foundation wall of the defendant's house, which put an end to all question upon that point.

LORD ELLENBOROUGH, in summing up to the jury, told them that it was admitted upon the record that some damage had been done by the

<sup>1</sup> *Prewitt v. Clayton*, 5 Mon. 4 *Accord.* — Ed.

<sup>2</sup> "That case raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it." *Per Blackburn, J.*, in *Kenyon v. Hart*, 6 B. & S. 252. — Ed.

<sup>3</sup> In *Wells v. Oddy*, 1 M. & W. 457, *Pickering v. Rudd* being cited as a decision against the plaintiff, Parke, B., said: "No; that point was not decided. It was thought by Lord Ellenborough to be a very nice question whether trespass was maintainable." Compare *Wandsworth Works v. United Co.*, 13 Q. B. Div. 915, 919, 927. See in support of such an action *United States v. Appleton*, 1 Sumn. 492; *Smith v. Smith*, 110 Mass. 302. — Ed.



continuance of the tree, and that the question was, whether in removing the mischief the defendants had done any damage to the tree which might have been avoided. *Verdict for the defendants.*<sup>1</sup>

## ELLIS v. THE LOFTUS IRON COMPANY.

IN THE COMMON PLEAS, NOVEMBER 19, 1874.

[*Reported in Law Reports, 10 Common Pleas, 10.*]

APPEAL from the county court judge of Glamorganshire.

The case as stated on appeal was as follows:—

The action was brought to recover £50, for injuries to the plaintiff's mare caused by the defendants' negligence.

The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing.

The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants.

The defendants were possessed of an entire horse, used by them as a draught cart-horse, and on Sunday, the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot, and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that the horse was as quiet a temper as you would ever wish a horse.

The plaintiff had warned the defendants to keep the horse away from his mares.

<sup>1</sup> If the branches or roots of a tree of one man encroach upon the land of another, the latter may cut away the branches or roots up to the boundary line. *Norris v. Baker*, 1 Rolle R. 394, 3 Bulst. 198, s. c.; *Crowhurst v. Burial Board*, 4 Ex. Div. 5, 10; *Grandona v. Lovdal*, 70 Cal. 161; *Countryman v. Lighthill*, 24 Hun, 405. — Ed.

The judge, being of opinion there was no trespass, and that the damage was too remote, held there was no case for the jury.

The question for the court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion.

*Field*, Q. C. (with him *B. Francis Williams*), for the plaintiff.

*Grantham* (with him *Charles Hall*), for the defendants.<sup>1</sup>

LORD COLERIDGE, C. J. The judgment of the county court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that, in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law, it seems to me that the merits are in the plaintiff's favor. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to this accident, the defendants' stallion had always been watched. Therefore, without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that *Lee v. Riley*<sup>2</sup> is a very strong authority for our present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The county court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable. The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> 18 C. B. (N. S.) 721.

protruded through the fence over the plaintiff's land, and that would, in my opinion, amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence, and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

BRETT, J. I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land, for which the defendants would be liable, and if there was, then, whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land, such a circumstance would constitute a trespass; but what I did doubt for some time was, whether, where there was no negligence at all on the part of the defendants, the same consequence would follow. Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone, 16th ed., vol. iii. c. 12, p. 211; Chitty on Pleading, 7th ed., vol. i. p. 93, and Comyns' Digest, title Trespass C, are all authorities to this effect. If, however, it were necessary that there should be evidence of negligence, I cannot say that I should go the length that my Brother Keating did in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law, but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of *Lee v. Riley*<sup>1</sup> is a distinct authority to the contrary, and the American case of *Vandenburgh v. Truax*,<sup>2</sup> quoted in the notes to *Vicars v. Wilcocks*,<sup>3</sup> is to the same effect.

DENMAN, J. I rather agree with my Brother Brett as to the amount of the evidence of negligence in this case. I am by no means clear that there was such evidence of negligence, as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The county court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now, during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man,

<sup>1</sup> 18 C. B. (N. S.) 722.

<sup>2</sup> 4 Denio, 464.

<sup>3</sup> 2 Sm. L. C. p. 499 (6th ed.).

might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of *Lee v. Riley*,<sup>1</sup> and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other party, by reason of the application to the mere act of an animal of the technical rule, *Cujus est solum ejus est usque ad cælum*. I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so. The only remaining point is whether the damages were too remote. As to that, I agree with the rest of the court that the case of *Lee v. Riley*<sup>1</sup> is conclusive.<sup>2</sup>

*Judgment for the plaintiff.*

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DOUGHERTY v. STEPP.

SUPREME COURT, NORTH CAROLINA, DECEMBER, 1835.

[Reported in 1 Devereux & Battle, 371.]

THIS was an action of trespass *quare clausum fregit*, tried at Buncombe, on the last circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

*Mendenhall*, for the plaintiff, contended that every unwarrantable entry on another man's soil is considered a trespass by breaking his close; for that in contemplation of law every man's land is separated and set apart from his neighbor's, by either a material or invisible and ideal boundary; and that every entry carries with it some damage, if no other, the treading down and bruising the herbage and shrubbery. That whenever a man has a right to enclose his estate by a real substantial fence, the law regards it as already enclosed against the unau-

<sup>1</sup> 18 C. B. (N. S.) 722.

<sup>2</sup> The cases of *Millen v. Fandrye*, Poph. 161, and *Glenham v. Hanby*, 1 Ld. Raym. 739, and the dictum attributed to Holt, C. J., in *Mason v. Keeling*, 1 Ld. Raym. 608, seem to show that the doubt indicated by Brett and Denman, JJ., existed also at the time when those cases were decided, though from the reports of the two first-mentioned cases it is difficult to gather what exactly was the point involved.

thorized intrusion of his neighbor. In illustration and support of these positions he cited 3 Bl. Comm. 209; 6 Bac. Abr. 581, title Trespass; *M'Kinzie's Executors v. Hulet*; <sup>1</sup> *Hammond's N. P.* 151, 152; *Dyer*, 225 *b*, pl. 40.

No counsel appeared for the defendant.

RUFFIN, C. J. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle that every unauthorized, and therefore unlawful, entry into the close of another is a trespass. From every such entry against the will of the possessor the law infers some damage; if nothing more, the treading down the grass or the herbage, or, as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held that, if there be no adverse possession, the title makes the land the owner's close. Making the survey and marking trees, or making it without marking, differ only in the degree and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute nor rule of reason that will make a wilful entry upon the land of another, upon an unfounded claim of right, innocent, which one who set up no title to the land could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

*Per Curiam. Judgment reversed.*<sup>2</sup>

<sup>1</sup> N. C. Term Rep. 181.

<sup>2</sup> *Dumont v. Miller*, 4 Aust. Jur. R. 152; *United States v. Taylor*, 35 Fed. Rep. 484; *Attwood v. Fricot*, 17 Cal. 37; *Pfeiffer v. Grossman*, 15 Ill. 53; *Mundell v. Hugh*, 2 Gill & J. 193; *Baltimore Co. v. Boyd*, 67 Md. 32; *Brown v. Manter*, 22 N. H. 472; *Guille v. Swan*, 19 Johns. 381; *Dixon v. Clow*, 24 Wend. 188; *Pierce v. Hosmer*, 66 Barb. 345; *Newsom v. Anderson*, 2 Ired. 42; *Norvell v. Thompson*, 2 Hill (S. C.), 470; *Carter v. Wallace*, 2 Tex. 206 *Accord*.

*Innis v. Crummins*, 1 Mart. N. S. 560; *Keller v. Mosser*, Tapp. (Ohio) 43 *Contra*. — Ed.

## SECTION V.

*Trespass upon Personal Property.*

## / MARLOW v. WEEKES.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1744.

[Reported in Barnes, Notes, 452.]

TRESPASS for assaulting, beating, and wounding plaintiff's mare.

After a verdict for plaintiff, defendant moved in arrest of judgment, objecting, that an action of assault and battery is not applicable to a dead thing, or a brute beast, but to one of the human species only. The objection was now overruled, and the order *nisi causa* discharged. Assault upon a ship (a dead thing) bad; but for an injury to a beast, a writ in trespass *vi et armis* appears in the Register;<sup>1</sup> the beating and wounding are found by the jury. *Draper* for defendant; *Wynne* for plaintiff.<sup>2</sup>

<sup>1</sup> There seems to be no such writ in the Register. Trespass for the asportation or the destruction of a chattel are the only writs for trespass affecting personal property. Other injuries to chattels were doubtless deemed of too trivial a nature to warrant a proceeding in the king's court, and were redressed in the inferior courts. See also Y. B. 12 Hen. IV. fol. 8, pl. 15. — Ed.

<sup>2</sup> "Action upon the case, for that the plaintiff was possessed of a horse and cart, and the defendant so violently beat the horse that the plaintiff was deprived of the use of his cart and horse for several days. The defendant pleaded not guilty. And the Chief Justice allowed him to give in evidence a justification for beating the horse, viz., that the plaintiff put his cart before the defendant's door, and prevented a cart which the defendant had hired from coming to take his goods, and therefore he whipped the horse to remove the cart. And the Chief Justice said, this differed from trespass *vi et armis* for assaulting a man, where the assault is a cause of action; but here the assault on the horse is no cause of action, unless accompanied with a special damage. And therefore he left it to the jury, on the question whether defendant did any more than was necessary to remove the horse and cart from his door, or beat the horse immoderately. And they found for the defendant. He said, if a hackney coach stands before a tradesman's door, and hinders customers, he may lawfully take hold of the horses and lead them away, and is not bound to take his remedy for damages. *Strange proquerente*." — *Slater v. Swan*, 2 Stra. 872. See also *Marentille v. Oliver*, *supra*, p. 27, and compare *Dand v. Sexton*, 3 T. R. 37; *Bull v. Colton*, 22 Barb. 94.

In *Paul v. Slason*, 22 Vt. 231 (see *Fullam v. Stearns*, 30 Vt. 456-57), the defendant, a sheriff, attached plaintiff's hay, and in removing it used the plaintiff's pitchfork. The plaintiff brought an action of trespass for taking the pitchfork, but failed. There would seem to have been no asportation, the fork being all the time on the plaintiff's premises. Nor was the pitchfork injured. The court proceeded upon the maxim, *De minimis non curat lex*; but on historical grounds their decision seems to be correct. — Ed.

## / DAVID MILLER v. JOHN BAKER 2D.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1840.

[Reported in 1 Metcalf, 27.]

TRESPASS against the sheriff of Norfolk for taking, by one of his deputies, nursery trees, shrubs, and plants, and converting them to his own use.

A verdict for the plaintiff was taken, and is to be sustained, or set aside, as the court shall order.

*S. D. Parker*, for the defendant.

*D. A. Simmons*, for the plaintiff.<sup>1</sup>

DEWEY, J. That trespass *de bonis asportatis* is a proper form of action where the owner of personal chattels seeks to recover against the sheriff damages for the illegal act of his deputy, in taking such chattels under color of process of law and by virtue of his office, is too well settled to admit of a question.

Nor is there any doubt that the acts done by the servant of the defendant would constitute a trespass, as to the personal chattels of the plaintiff. "A forcible taking of goods is not necessary to enable the owner to maintain trespass. On a similar question in *Gibbs v. Chase*,<sup>2</sup> Sewall, J., says, "No actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover." It is sufficient to maintain trespass, if the party exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling, though there be no manual taking or removal.<sup>3</sup>

In the present case there was not only an attachment of the property, but the placing of a keeper over it with directions to permit no one to remove the same, and an entry and exclusive possession by the keeper. It seems, therefore, that as to so much of the property in controversy as is conceded to be personal chattels, the case is clearly with the plaintiff.<sup>4</sup>

<sup>1</sup> The statement of facts, the arguments of counsel, and a portion of the opinion are omitted. — Ed.

<sup>2</sup> 10 Mass. 128.

<sup>3</sup> *Wintringham v. Lafoy*, 7 Cow. 735 ; *Philips v. Hall*, 8 Wend. 610.

<sup>4</sup> *Cramer v. Mott*, L. R. 5 Q. B. 357 (but see *Hartley v. Moxham*, 3 Q. B. 701); *Gibbs v. Chase*, 10 Mass. 125 ; *Morse v. Hurd*, 17 N. H. 246 ; *Wintringham v. Lafoy*, 7 Cow. 735 ; *Phillips v. Hall*, 8 Wend. 610 ; *Neff v. Thompson*, 8 Barb. 213 *Accord*. Compare *Holmes v. Doane*, 3 Gray, 328.

To constitute an attachment or levy upon personal chattels, the acts of the officer must be such as would make him a trespasser but for the protection of his writ. In accordance with this test there was thought to be a valid attachment in the following cases : *Very v. Watkins*, 23 How. 469 ; *Richardson v. Rardin*, 88 Ill. 124 ; *McBurnie v. Overstreet*, 8 B. Mon. 303 ; *Nichols v. Patten*, 18 Me. 231 ; *Denny v. Warren*, 16

Mass. 420 ; Gordon v. Jenney, 16 Mass. 465 ; Naylor v. Dennie, 8 Pick. 198 ; Hemmenway v. Wheeler, 14 Pick. 408 ; Shephard v. Butterfield, 4 Cush. 425 ; Patch v. Wessels, 46 Mich. 249 ; Huntington v. Blaisdell, 2 N. H. 317 ; Cooper v. Newman, 45 N. H. 339 ; Green v. Barker, 23 Wend. 490 ; Barker v. Binniger, 14 N. Y. 270 ; Roth v. Wells, 29 N. Y. 471 ; Pugh v. Calloway, 10 Ohio St. 488 ; Moss v. Moore, 3 Hill, S. Ca. 276 ; Newton v. Adams, 4 Vt. 437 ; Lyon v. Rood, 12 Vt. 233 ; Slate v. Barker, 26 Vt. 647 ; Bullitt v. Winston, 1 Munf. 269.

In the following cases, on the other hand, by the same test, there was not a valid attachment : Adler v. Roth, 5 Fed. Rep. 895 ; Cobb v. Cage, 7 Ala. 619 ; Abrams v. Johnson, 65 Ala. 465 ; Tafts v. Manlove, 14 Cal. 47 ; Crisman v. Dorsey, 12 Colo. 567 ; Hollister v. Goodale, 8 Conn. 332 ; Powell v. McKechnie, 3 Dak. 319 ; Levy v. Shockley, 29 Ga. 710 ; Minor v. Herriford, 25 Ill. 344 ; Havelly v. Lowry, 30 Ill. 446 ; Chittenden v. Rogers, 42 Ill. 100 ; Culver v. Rumsey, 6 Ill. Ap. 598 ; Crawford v. Newell, 23 Iowa, 453 ; Rix v. Silknitter, 57 Iowa, 262 ; Bickler v. Kendall, 66 Iowa, 703 ; Hibbard v. Zenor, 75 Iowa, 471 ; Banks v. Evans, 18 Miss. 35 ; Gates v. Flint, 39 Miss. 365 ; Bryant v. Osgood, 52 N. H. 182 ; Haggerty v. Wilber, 16 Johns. 287 ; Beekman v. Lansing, 3 Wend. 446 ; Westervelt v. Pinckney, 14 Wend. 123 ; Camp v. Chamberlain, 5 Den. 198 ; Root v. R. R. Co., 45 Ohio St. 222 ; State v. Cornelius, 5 Oreg. 46 ; Duncan's App., 37 Pa. 500 ; Carey v. Bright, 58 Pa. 70, 84 ; Connell v. Scott, 5 Baxt. (Tenn.) 595 ; Brown v. Lane, 19 Tex. 203 ; Blake v. Hatch, 25 Vt. 555.

In Lyon v. Rood, *supra*, Redfield, J., said : "From the fact that in England they have no law for attaching property upon mesne process, and, that judgments in that country create a lien upon property, without the necessity of a formal levy of the execution, questions of this character do not arise there. The cases in the English courts, most analogous to the present case, are those which concern the arrest of the body. . . . To constitute an arrest of the person, the officer must be armed with legal process, he must have the custody and control of the defendant's body, at least potentially, and he must claim that control by virtue of the process, and, unless it is submitted to, must put it in actual exercise. The same rule, with such modifications as the different subject-matters may require, will apply to the attachment of personal property. It is not perhaps necessary, in any case, that the officer should actually touch the property, but, to constitute a legal attachment, he must have the custody or control of the property, either by himself or his servants, in such a way as either to exclude all others from taking the custody of the property; or, at least, to give timely and unequivocal notice of his own custody. Hence, in Lane et al. v. Jackson, 5 Mass. R. 157, Parsons, C. J., says, 'That to constitute an attachment of goods, the officer must have the actual possession and custody.' And in Train v. Wellington, 12 Mass. R. 495, the same rule is adhered to, with this qualification, 'not that every article must be taken hold of, but that the officer must be in view of the whole, with the power of taking them into his actual custody.' In the case of Denny v. Warren, 16 Mass. R. 420, it was held that taking possession of the key of a store and declaring an intention to attach, was a sufficient attachment. The same rule is adhered to in the case of Gordon v. Jenney, Ib. 465. In Naylor v. Dennie, 8 Pick. 198, it was decided that goods, in the hold of a ship, might be attached by the officer going on board the ship and leaving a keeper to take care of them. And again, in Merrill v. Sawyer, 8 Pick. 397, it was decided that hay in a barn was sufficiently attached, by putting a notification of the attachment on the barn door. There is the case of Hollister v. Goodale, 8 Conn. 332, where the court decided that if one officer have the key of a carriage house and go and open it and declare that he attaches a carriage standing therein, and at the same time another officer rushes in and first gets the manual custody of the carriage, he will hold it, as having first legally attached it, which seems not to accord, in principle, with the other cases.

"In regard to the last case referred to, I can only say, that, if it is correctly reported, it must have been wrongly decided, and Mr. Justice Peters, who tried the case at the circuit, and ruled the law the other way, must have been a man of very singular modesty and urbanity to have said that 'he was inclined to concur (with his brethren), though not quite satisfied that the charge was wrong.' " — ED.



## DANIEL COLE v. JACOB FISHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY TERM, 1814.

[Reported in 11 Massachusetts Reports, 137.]

TRESPASS *vi et armis*, for firing a gun, by which the plaintiff's horse was frightened, and ran away with his chaise, and broke and spoiled it, &c.

The cause came before the court upon an agreed statement of facts to the following effect, viz. : The defendant, after washing out two guns, went to the door of his shop, and, standing there, discharged one of the guns for the purpose of drying it, the said shop-door being about one rod distant from the highway. At the time of said discharge, the plaintiff's horse, harnessed in his chaise, was fastened by his bridle to the fence on the opposite side of the highway. The horse, being frightened by the discharge of the gun, broke the bridle, and ran away with the chaise, which was thereby broken and injured. After the horse was unharnessed and put into a pasture in the defendant's neighborhood, he discharged another gun, for the like purpose of drying it.

If, upon these facts, in the opinion of the court, the plaintiff could maintain this action, the defendant was to be defaulted, and the plaintiff's damages to be assessed by a jury, unless agreed by the parties ; if the plaintiff could not, in the opinion of the court, maintain his action on the facts agreed, he was to become nonsuit, and the defendant recover his costs

There was no argument, and the opinion of the court was delivered by

SEWALL, C. J.<sup>1</sup> Upon this state of facts, our opinion is, that the plaintiff has sustained an injury by the act of the defendant. The plaintiff has a right of action, a just demand for damages ; but whether in the form of trespass, or of trespass on the case, is a question of some difficulty in the circumstances of this case.

The well-known distinction of immediate injury and consequential injury is the rule upon which our doubts have arisen ; in all other respects, the action is clearly maintained for the plaintiff upon the facts agreed.

It is immaterial, as respects the right of action, or the form, whether the act of the defendant was by his intention and purpose injurious to the plaintiff, or the mischief which ensued was accidental, and beside his intention, or contrary to it. The decision in the case of *Underwood v. Hewson* <sup>2</sup> has never been questioned. There the defendant was uncocking his gun, when it went off and accidentally wounded a

<sup>1</sup> A portion of the opinion is omitted. — ED.

<sup>2</sup> *Strange*, 596.

bystander. The defendant was charged, and holden liable in trespass. Other cases, before and since, might be cited, in which the same doctrine, which governed in that decision, has been recognized as the law. There is a very full and accurate collection of the decisions on this subject, both as to the right and the form of action, in Chitty on Pleading, to which I refer.<sup>1</sup>

In the case at bar, it does not appear, from the facts stated, how near the place where the horse was fastened was to the door of the shop, the place where the gun was fired. If the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant, or if it was in evidence that he had noticed their being there, exposed to the consequences of his firing the gun, and the distance was such as that, by common experience, there might be a reasonable apprehension of frightening the horse by the discharge of the gun, I should think the defendant, although no purpose of mischief was proved, and even if it was not a case of very gross negligence, liable in an action of trespass. On the other hand, if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such as that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant to render him liable in this form of action; although undoubtedly liable in an action upon the case, to the extent of the damage actually sustained by the plaintiff.<sup>2</sup>

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/ BRUCH *v.* CARTER.

COURT OF ERRORS AND APPEALS, NEW JERSEY, MARCH TERM, 1867.

[Reported in 3 *Vroom*, 554.]

IN trespass. Error to Warren circuit.

*S. B. Ransom*, for plaintiff in error. *J. G. Shipman*, for defendant in error.

The opinion of the court was delivered by

WOODHULL, J.<sup>3</sup> The writ of error in this case brings up for review

<sup>1</sup> Chitty, 123-128; Sir T. Raym. 422, 467; Hob. 134; Str. 596.

<sup>2</sup> *James v. Caldwell*, 7 Yerg. 38; *Waterman v. Hall*, 17 Vt. 128 *Accord*.

In *Loubz v. Hafner*, 1 Dev. 185, the defendant was held liable in trespass for intentionally causing the plaintiff's horse to run away with him, to his damage, by beating a drum.

*Commonwealth v. Wing*, 9 Pick. 1, decided that if one discharged a gun with knowledge that the report would throw an individual into convulsions, and such effect followed, his act was an indictable offence. Compare *Rogers v. Elliott*, 146 Mass. 349. — ED.

<sup>3</sup> The opinion has been slightly abridged. — ED.

a judgment of the Warren county Circuit Court against the plaintiff in error and two co-defendants, Jacob Cowell and Robert Fair, after verdict in an action of trespass.

The defendants, Cowell and Fair, having refused to join in the writ, the plaintiff in error, after rule and severance, was allowed to prosecute it alone.

The declaration contains four counts. The first sets forth that the defendants, "with force and arms, seized and wrested, from a certain hitching post at which there stood tied a certain horse of the said plaintiff of great value, to wit, of the value of three hundred dollars, and took the said horse a great distance, to wit, the distance of ten yards, and tied him to another post, and threw the said horse down and killed him."

The second count alleges that the defendants, "with force and arms, seized and broke loose from a certain post of the said plaintiff, where he stood tied, a certain other horse of the said plaintiff of great value, &c., and removed the said horse a great distance, to wit, a distance of ten yards, and fastened the said other horse to a certain other post, by means whereof the said horse of the said plaintiff became entangled in his halter, was thrown with great violence upon the ground, and was instantly killed."

The third count states that the defendants, "with force and arms, broke loose, &c. (as in the second), and threw down, and caused to be thrown down upon the ground, the last-named horse of the said plaintiff, and with a certain horse, then in the possession of the said defendant, George Bruch, did stamp, beat, strike, injure, and kill the said last-named horse of the said plaintiff."

The fourth count thereby charges that the defendants, "with force and arms, and with a certain horse, which the said defendants then and there had, so greatly beat, hurt, and wounded a certain other horse of him, the said plaintiff, of great value, &c., that by reason thereof the same horse afterwards died."

To this declaration the plaintiff in error, by his attorney, pleaded the general issue, and the other defendants below, by their attorney, pleaded the same plea.

The first error assigned is, "that the declaration, and the matters therein contained, are not sufficient in law for the said John Carter to maintain his action against the said George Bruch.

In the absence of anything to indicate wherein the declaration is supposed to fall short of disclosing a legal cause of action, it is sufficient to say that, taking the facts to be true as stated in either one of the four counts, they show a trespass committed by the defendants to the injury of the plaintiff below, and for which he may recover damages in this action.

The objection to the declaration is, therefore, not sustained.

It appears by the bill of exceptions that, after the plaintiff below had rested his cause, the defendants, by their counsel, moved that the

plaintiff be nonsuited, on the ground that he had not established his right to recover in the action. The motion was overruled, and this is the second matter assigned for error.

If there was error in refusing to order a nonsuit, it must be because the plaintiff had failed to offer any evidence from which the jury might legally infer that the defendants, or either of them, had committed any act of trespass alleged in the declaration.

No extended examination of the testimony is required to show that the motion to nonsuit was properly refused. The fact that Jacob Cowell, one of the defendants, untied the plaintiff's horse, and removed him from the hitching-post, to which his owner had fastened him, is so clearly established by the testimony of John Carter, the plaintiff below, and of Jacob Cowell himself, that it does not appear to have been at all controverted in the cause. It is equally clear that the post in question stood in the highway, and that the plaintiff's right to use it, if not exclusive, was, at least, as good as that of either of the defendants. Here, then, we find, without looking further, acts done by one of the defendants, which must be held to amount to at least a technical trespass, for which the plaintiff below would be entitled, under the declaration in the cause, to recover nominal damages against this defendant, if nothing more.

The plaintiff had, therefore, established his right to recover in the action, and there was no error in overruling the motion for a nonsuit.

## SECTION VI.

*Excusable Trespasses.*

## (a) ACCIDENT OR MISTAKE.

## WEAVER v. WARD.

IN THE KING'S BENCH, EASTER TERM. 1616.

[Reported in *Hobart*, 134.]

WEAVER brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise *in re militari* against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, did hurt and wound the plaintiff; which is the same, &c., *absque hoc*, that he was guilty *aliter sive alio modo*. And, upon demurrer by the plaintiff, judgment was given for him; for, though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet, in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, if a lunatic hurt a man, he shall be answerable in trespass,<sup>1</sup> and, therefore, no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here

<sup>1</sup> *Gates v. Miles*, 3 Conn. 64, 70; *McIntyre v. Sholty*, 121 Ill. 660; *Amick v. O'Hara*, 6 Blackf. 258, 259; *Cross v. Kent*, 32 Md. 581; *Bullock v. Babcock*, *infra*, p. 64; *Krom v. Schoonmaker*, 3 Barb. 647 (imprisonment); *Ward v. Conatser*, 4 Baxt. (Tenn.) 64 *Accord*.

The rule is the same as to torts in general. *Behrens v. McKenzie*, 23 Iowa, 333, 343; *Movain v. Devlin*, 132 Mass. 87 (nuisance); *Jewell v. Colby* (N. H. 1891), 24 Atl. R. 902; *Re Heller*, 3 Paige, 199; *Williams v. Cameron*, 26 Barb. 172; *Lancaster Bank v. Moore*, 78 Pa. 407, 412; *Morse v. Crawford*, 17 Vt. 499 (conversion).

In *McIntyre v. Sholty*, *supra*, Magruder, J., said, p. 664: "It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle, that, in trespass, the intent is not conclusive. Mr. Sedgwick, in his work on Damages (margin, p. 456), says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to his view, however, is a majority of the decisions and text writers." — ED.

the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.<sup>1</sup>

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## DICKENSON v. WATSON.

IN THE KING'S BENCH, HILARY TERM. 1682.

[Reported in *T. Jones*, 205.]

THE plaintiff brought error on a judgment in the court of the sheriffs of the city of York, in trespass for an assault, battery, and wounding of the plaintiff's eye, by discharging of a gun charged with powder and hail-shot, by which he lost the sight of his eye. The defendant pleaded *actio non*, because he is, and at the time of the trespass was, an officer appointed for collecting the duty of hearth-money; and for the better discharge of his office, and more sure custody and keeping of the money by him collected and to be collected, he provided himself with fire-arms, and having one of his pistols in his hands, and intending to discharge it *ne aliquod damnum eveniret*, he discharged it (*nemine in opposito visu existente*), and while he discharged it, the plaintiff *casualiter viam illam præterivit, et si aliquod malum ei inde accideret hoc fuit contra voluntatem*, of the defendant. *Quæ est eadem transgressio*. Upon this the plaintiff demurred, and judgment was given for him; whereupon error was brought, and judgment was affirmed, nothing being urged besides the sufficiency of the plea. But the court held it to be insufficient; for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo*, as was done in the case of *Weaver and Ward*. And yet judgment there given for the plaintiff.

<sup>1</sup> *Underwood v. Hewson*, 1 Stra. 596; *Welch v. Durand*, 36 Conn. 182; *Atchison v. Dullam*, 16 Ill. Ap. 42; *Hodges v. Westbeyer*, 6 Monr. (Ky.) 337; *Chataigne v. Bergeron*, 10 La. An. 699; *Sullivan v. Murphy*, 2 Miles, 298; *Castle v. Duryee*, 2 Keyes, 169; *Taylor v. Rainbow*, 2 Hen. & Mun. 423 *Accord*.

See to the same effect *Morgan v. Cox*, 22 Mo. 373; *Dygert v. Bradley*, 8 Wend. 469; *Jennings v. Fundeburg*, 4 McC. 161; *Tally v. Ayers*, 3 Sneed, 677, in which case the injury was not to the plaintiff's person, but to his chattels. — ED.

## JAMES v CAMPBELL.

AT NISI PRIUS, CORAM BOSANQUET, J., APRIL 25, 1832.

[Reported in 5 Carrington &amp; Payne, 372.]

ASSAULT and battery. It appeared that, at a parish dinner, the plaintiff and defendant (who, it seemed, were not on good terms, in consequence of something which took place with respect to a leet jury), together with a Mr. Paxon and others, were present. Mr. Paxon and the defendant quarrelled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him. Afterwards Mr. Paxon wrote, and the defendant was desired to put his name to, the following paper :

“ Frank Paxon having struck me, I returned the blow, but must, as I have been since informed, have struck Mr. James instead of Mr. Paxon, for which I am sorry.”

The defendant, upon this, said: “ I won’t have that in ; I’m not sorry ; I will hunt the vagabond in all quarters.”

*Bodkin*, for the defendant, in his address to the jury, contended that, if the defendant did not intentionally strike the plaintiff, they ought to find their verdict for him.

MR. JUSTICE BOSANQUET (to the jury). If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages.

*Verdict for the plaintiff. Damages, £10.<sup>1</sup>*

## STANLEY v. POWELL.

IN THE QUEEN’S BENCH DIVISION, NOVEMBER 3, 1890.

[Reported in 1891, 1 *Queen’s Bench Division*, 86.]

DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.<sup>2</sup>

In the statement of claim the plaintiff alleged that the defendant had *negligently and wrongfully and unskilfully* fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury :

<sup>1</sup> *Ball v. Axten*, 4 F. & F. 1019 ; *Peterson v. Hafner*, 59 Ind. 130 ; *Anderson v. Arnold*, 79 Ky. 370 ; *Corning v. Corning*, 6 N. Y. 97 ; *Cogdell v. Yett*, 1 Coldw. 230 ; *Knott v. Wagner*, 16 Lea, 481 ; *Wright v. Clark*, 50 Vt. 130 *Accord.* — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were, that on Nov. 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and, striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases — that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amend-



ment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame v. Bray*,<sup>1</sup> to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere *dictum* of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, "*Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *prima facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was *Weaver v. Ward*, decided in 1607. There is no doubt that that case contains *dicta* which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: "Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as sol-

<sup>1</sup> 3 East, 593.

diers of the train-band, and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie, *unless* he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons v. Pepper*, decided in 1695, merely decided that a plea merely showing that an accident caused by a runaway horse was *inevitable*, was a bad plea in an action of trespass, because, if *inevitable*, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which show clearly the *ratio decidendi* of that case, are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found *not guilty*, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of *Wakeman v. Robinson*, and *Hall v. Fearnley*, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of *dictum* in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment explains *Wakeman v. Robinson* thus: "The act of the defendant" (*viz.*, driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*. It was there agreed that an *involuntary* act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood v. Hewson*,<sup>1</sup> decided in 1724, was relied on for the plaintiff. The report is very short. "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass — *Strange pro defendente*." The marginal note in Nolan's edition of 1795, not necessarily *Strange's* own composition, is this: "Trespass lies for an accidental hurt;" and in that edition there is a

<sup>1</sup> 1 Str. 596.

reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver v. Ward*, I find he writes as follows: "So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam*; for no man shall be excused of a trespass, unless it be justified entirely without his default: *Weaver v. Ward*; and, therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded: *Underwood v. Hewson*." On referring back to *Weaver v. Ward*, I can find nothing in the report to show that the court held, that in order to constitute a defence in the case of a trespass it is necessary to show that the act was *inevitable*. If *inevitable*, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

*Day v. Edwards*<sup>1</sup> merely decides that where a man negligently *drives* a cart against the plaintiff's carriage, the injury being committed by the *immediate* act complained of, the remedy must be trespass, and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame v. Bray*.<sup>2</sup> That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricule, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any *other* respect as to the manner of his driving. It was therefore objected for the defendant, that the injury *having happened from negligence* and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*;" and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that

<sup>1</sup> 5 T. R. 648 (1794).

<sup>2</sup> 3 East, 593.

there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes v. Mather*, and *Bramwell, B.*, in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, Trespass, I., p. 706, with a marginal reference to *Weaver v. Ward*. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand, "that the injury was unintentional"), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence, — there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned, — and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an

action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant. As to costs, they must follow, unless the defendant foregoes his right.

*Judgment for the defendant.*<sup>1</sup>

## (BULLOCK v. BABCOCK.)

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1829.

[Reported in 3 Wendell, 391.]

THIS was an action of trespass, assault, and battery, tried at the Madison circuit in September, 1828, before the Hon. Nathan Williams, one of the circuit judges.

In 1816, the defendant, then being about twelve years of age, shooting an arrow from a bow, struck the plaintiff and put out one of his eyes, the plaintiff being then between nine and ten years of age. The plaintiff and defendant were schoolmates. The boys attending the school were assembled near the school-house. One of them had a bow and arrow, with which he and the defendant had been shooting at a mark. Some remark was made by the plaintiff, when the defendant said, "I will shoot you," and took the bow and arrow from another boy who then held it. The plaintiff ran into the school-house and hid behind a fire-board standing before the fire-place in the school-room. The defendant followed to the door of the school-room, and saying, "See me shoot that basket," discharged the arrow. At that moment the plaintiff raised his head above the fire-board, and the arrow struck him. There was a basket standing on a desk in the direction that the arrow was aimed. When the arrow was shot, there were a number of boys in the school-room. There had been no quarrel between the boys. The plaintiff, however, on entering the school-house, was frightened, and said he was afraid he would be shot. The plaintiff suffered great pain for two months, became blind of one eye, and for five years was disabled from attending school in consequence of the weakness of sight of the other eye. His mother became a widow; and when the plaintiff was able to attend school, her poverty prevented his receiving an

<sup>1</sup> Alderson v. Waistell, 1 C. & K. 358; The Virgo, 25 W. R. 397; Nitro-Glycerine Case, 15 Wall. 524 (*semble*); Strouse v. Whittlesey, 41 Conn. 559; Sutton v. Bonnett, 114 Ind. 243; Holland v. Bartch, 120 Ind. 46 (see also Bennett v. Ford, 47 Ind. 264); Harvey v. Dunlop, Hill & D. 193; Centre v. Finney, 17 Barb. 94, Seld. notes, 80 *Accord.* — ED.

ordinary education. The defendant's father was a man of considerable property, but no compensation was ever made for the injury inflicted. This suit was commenced in 1827, within a year after the plaintiff attained his age.

The judge charged the jury that the shooting the arrow in the school-room where there were a number of boys assembled was an unlawful act; that it appeared to him to have been, at the least, grossly negligent and unjustifiable; and that, if the jury thought so, they ought to find a verdict for the plaintiff, with damages. The defendant excepted. The jury found for the plaintiff, with \$180 damages, and a motion was now made to set aside the verdict.

*J. A. Spencer*, for the defendant.

*P. Gridley*, for plaintiff.<sup>1</sup>

By THE COURT, MARCY, J. It is not, I apprehend, necessary for us to say whether the judge erred or not in his remark to the jury that, under the circumstances of the case, the act of the defendant in shooting the arrow in the school-room, where there were a number of scholars, was not lawful; for, if the act in itself was lawful, and there was not a proper care to guard against consequences injurious to others, the actor must be held responsible for such consequences.

In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another, it was holden to be a trespass. . Year-Book, 21 H. VII. fol. 28. So where a number of persons were lawfully exercising themselves at arms, one, whose gun accidentally went off, was held liable in trespass for the injury occasioned by the accident. *Weaver v. Ward*. Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. *Leame v. Bray*.<sup>2</sup> It is decided in the case of *Wakeman v. Robinson*, if the accident happen entirely without the fault of the defendant, or any blame being imputable to him, an action will not lie. In that case, the blame imputable to the defendant was, that, his horse being young and spirited, he used him without a curb rein; that in his alarm he probably pulled the wrong rein; and that he ought to have continued on in a straight course. The blame fairly imputable to the defendant, it will be perceived, must have been slight indeed, as it certainly was in the case of the injury done by the glancing of the arrow when shooting at a mark (a lawful act), and by the accidental discharge of the musket at a training; and yet, in each of these cases, an action for the injury was maintained. Unless a rule is to be applied to this case different from that applicable to a transaction between adults, the proof was most abundant to charge the defendant with the consequences of the injury. Infants, in the same manner as adults, are liable for trespass, slander, assault,

<sup>1</sup> The arguments of counsel are omitted, and the opinion is slightly abridged. — ED.

<sup>2</sup> 3 East, 593.

&c.<sup>1</sup> Bing. on Infancy, 110; 8 T. R. 335; 16 Mass. Rep. 389; 2 Inst. 328. Where infants are the actors, that might probably be considered

<sup>1</sup> The liability of an infant for his torts is universally recognized.

TRESPASS. Y. B. 35 Hen. VI. f. 11, pl. 18; Burnand v. Harris, 14 C. B. N. S. 45; Neal v. Gillett, 23 Conn. 437; Wilson v. Garrard, 59 Ill. 51; Peterson v. Haffner, 59 Ind. 130; Scott v. Watson, 46 Me. 362; Marshall v. Wing, 50 Me. 62; Sikes v. Johnson, 16 Mass. 389; School District v. Bragdon, 23 N. H. 507; Campbell v. Stakes, 2 Wend. 137; Hartfield v. Roper, 21 Wend. 615, 620; Tift v. Tift, 4 Den. 175, Huchting v. Engel, 17 Wis. 230.

TROVER. Mills v. Graham, 1 B. & P. N. R. 140; Bristow v. Clark, 1 Esp. 172; Vasse v. Smith, 6 Cranch, 226; Oliver v. McClellan, 21 Ala. 675; Ashlock v. Vivell, 29 Ill. Ap. 388; Lewis v. Littlefield, 15 Me. 233; Homer v. Thwing, 3 Pick. 492; Walker v. Davis, 1 Gray, 506; Wheeler Co. v. Jacobs, 21 N. Y. Sup. 1006; Green v. Sperry, 16 Vt. 390; Baxter v. Bush, 29 Vt. 465.

CASE FOR DECEIT. Fitts v. Hall, 9 N. H. 441; Wood v. Vance, 1 N. & McC. 197.

CASE FOR SLANDER. Hodsman v. Grissell, Noy, 129.

CASE FOR NEGLIGENCE. Humphrey v. Douglass, 10 Vt. 71 *Accord*.

See, further, Robbins v. Mount, Robt. 553, 560; Hanks v. Deal, 3 McC. 257.

In Scott v. Watson, *supra*, Appleton, J., said: "Nor is his infancy any defence, for infants are liable for torts. . . . The parent is not answerable for the torts of his minor child, committed in his absence and without his authority or approval, but the minor is answerable therefor. Tift v. Tift, 4 Denio, 177. The minor is not exempt from liability, though the trespass was committed by the express command of the father. Humphrey v. Douglass, 10 Vt. 71.

"Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defence. No such construction can be given to the command, 'Children, obey your parents in the Lord, for this is right,' as to sanction or justify the trespass of the son upon the land of another, and the asportation of his crops, even though done by the express commands of his father. The defence is as unsound in its theology as it is baseless in its law." (a)

May, J., dissented, saying: "I am not quite satisfied with either the law or the theology of the opinion in this case. That sins of ignorance may be winked at, is both a dictate of reason and of Scripture. It is true, as a general rule, that infants who have arrived at the age of discretion are liable for their tortious acts. But, for the protection of infants, ought not the rule to be limited to cases where the infant acts under such circumstances that *he must know or be presumed to know* that the acts which he commits are unauthorized and wrong, when it appears that in the commission of the acts he was under the control and direction of his father? Will not an opposite doctrine tend to encourage disobedience in the child, and thus be subversive of the best interests of the community? Will it not also tend to subject him to embarrassment and insolvency when he shall arrive at full age? If all the members of a family under age are to be held liable in trespass or trover for the food which they eat, when that food is in fact the property of another, but, being set before them, they partake of it, in ignorance of such fact, by the command or direction of the parent, and under the belief that it is his, will not such a doctrine be in conflict with the principle that the common law is intended as a shield and protection against the improvidence of infancy? While the decided cases upon this subject seem to be limited to cases of contract, is there not the same reason for extending it, and applying it to cases like the one before us? In all the cases which I have examined in which infants have been held liable, the proof shows acts of positive wrong committed under circumstances where the infant must have known the nature and character of his acts. If the doctrines of the opinion are to prevail in a case like this, then the common law is but the revival of the old

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(a) Smith v. Kron, 96 N. Ca. 392, 397; Humphrey v. Douglass, 10 Vt. 71; Huchting v. Engel, 17 Wis. 230 *Accord*. — Ed.

an unavoidable accident which would not be so considered where the actors are adults ; but such a distinction, if it exists, does not apply to this case. The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors ; for idiots and lunatics, as we see by the case reported in Hobart, are responsible in the action of trespass for injuries inflicted by them. 1 Chit. Pl. 66.

*Motion for a new trial denied.<sup>1</sup>*

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GEORGE BROWN v. GEORGE K. KENDALL.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1850.

[Reported in 6 Cushing, 292.]

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before Wells, C. J., in the Court of Common Pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters ; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them ; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated ; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs ; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion ; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that " if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

doctrine that the parents, by eating sour grapes, have set the children's teeth on edge. The rule that a servant who acts in ignorance of the rights of his principal is to be held liable for his acts, does not fall within the principles for which I contend." — ED.

<sup>1</sup> Welch v. Durand, 36 Conn. 182 ; Flinn v. State, 24 Ind. 286 ; Mercer v. Corbin, 117 Ind. 450 ; Commonwealth v. Lister, 15 Phila. 405 *Accord.* — ED.



The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

This case was argued at the sittings in Boston, in January last, by *J. G. Abbott*, for the defendant, and by *B. F. Butler* and *A. W. Furr*, for the plaintiff.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this Commonwealth by statute, which provides that actions of trespass for assault and battery shall survive.<sup>1</sup>

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the

<sup>1</sup> Rev. Sts. c. 93, § 7.

term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*,<sup>1</sup> *Huggett v. Montgomery*.<sup>2</sup>

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent, if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the

<sup>1</sup> 3 East, 593.

<sup>2</sup> 2 N. R. 446, Day's Ed., and notes.

defendant was free from blame, he will not be liable.<sup>1</sup> *Wakeman v. Robinson*. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*,<sup>2</sup> *Vincent v. Stinehour*.<sup>3</sup> In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and

<sup>1</sup> 2 Greenl. Ev. §§ 85-92.

<sup>2</sup> 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes.

<sup>3</sup> 7 Vt. 69.

the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it.<sup>1</sup> *Powers v. Russell*,<sup>2</sup> *Tourtellot v. Rosebrook*.<sup>3</sup>

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover. *New trial ordered*.<sup>4</sup>

<sup>1</sup> 2 Greenl. Ev. § 85.

<sup>2</sup> 13 Pick. 69, 76.

<sup>3</sup> 11 Met. 460.

<sup>4</sup> Nitro-Glycerine Case, 15 Wall. 524, 538 (*semble*); *Morris v. Platt*, 32 Conn. 75, 84-90 (defendant in defending himself lawfully against A. fired a pistol at A., but accidentally hit the plaintiff); *Paxton v. Boyer*, 67 Ill. 132 (facts similar to those in *Morris v. Platt*, *supra*) *Accord*. — ED.

## BASELY v. CLARKSON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1681.

[Reported in 3 Levinz, 37.]

TRESPASS for breaking his close called the balk and the hade, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff; and in mowing his own land he involuntarily and by mistake mowed down some grass, growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, &c., *quæ est eadem*, &c. *Et quod ante emanationem brevis* he tendered to the plaintiff 2s. in satisfaction; and that 2s. was a sufficient amends. Upon this the plaintiff demurred, and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable: they cannot be known.

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## HIGGINSON v. YORK.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE TERM, 1809.

[Reported in 5 Massachusetts Reports, 341.]

TRESPASS for breaking and entering the close of the plaintiffs, called Burnt Coat Island, and taking and carrying away three hundred cords of the plaintiffs' wood.

Upon the general issue pleaded and joined, the action was tried at the sittings after the last June term in this county, and a verdict found for the plaintiff, subject to the opinion of the court upon the following facts contained in the judge's report.

In the year 1805, the defendant, being master of a vessel regularly employed in the coasting trade, was applied to by one Kenniston, who was then a trader in the town of Sedgwick, to take a cargo of wood from the said island to Boston. He accordingly went to the island with Kenniston, took on board his vessel thirty or forty cords of wood, and carried the same to Boston, where it was sold, and the proceeds thereof accounted for by the defendant to Kenniston.

It was also in evidence that one Phinney, without right or authority, had cut the wood in question, and sold it to Kenniston, previously to his agreement with the defendant to carry it to Boston.

There was no evidence that the defendant had any knowledge of the trespass committed by Phinney, or that he was in any manner concerned, or aiding or assisting therein, other than by going to the island,

and taking the wood upon freight as aforesaid. The title of the plaintiffs to the island was not questioned.

The cause was submitted without argument. The court did not hesitate in giving their opinion in favor of the action, observing that the defendant was clearly a trespasser in going, without the license of the owner, upon the island of the plaintiffs; and supposing his taking the wood there to be a mistake as to the rights of Kenniston, and that under this mistake K. had been paid the full value of the wood taken by York, neither the mistake nor the accommodation, as being between joint trespassers, was any answer to the lawful owner, sustaining the injury to his soil or the loss of his chattels. For when taken, the wood, being cut and separated from the soil, was the personal property of the plaintiffs.

The doubt in this case, which probably occasioned it to be reserved, was a mistaken apprehension that K. & Y. were to be constructively connected with Phinney in his original trespass in cutting the wood. But the causes of action are entirely distinct. P. acquired no property in the wood by cutting it, as against the owners of the soil; K. could acquire none from him, and could transfer none to the present defendant; and these last broke the close of the plaintiffs in going upon their island, and were trespassers, and as such are chargeable in damages, at least to the value of the wood taken and carried away.

*Judgment according to the verdict.<sup>1</sup>*

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### WAKEMAN v. ROBINSON.

IN THE COMMON PLEAS, APRIL 29, 1823.

[Reported in 1 Bingham, 213.]

TRESPASS for driving against plaintiff's horse, and injuring him with the shaft of a gig. Plea: General issue. There was also a special plea, which was not supported by the defendant's evidence at the trial.

The case then made out (London sittings after last Michaelmas term) was as follows:—

The plaintiff's wagon and horses were proceeding slowly along their proper side of the road towards London. The defendant was coming from London in a gig, at the rate of seven or eight miles an hour. When the defendant was near the plaintiff's wagon, a coach proceeding towards London approached them on the side of the road oppo-

<sup>1</sup> Russell v. Irby, 13 Ala. 181; Givens v. Kendrick, 15 Ala. 648; Allison v. Little, 85 Ind. 512 (*semble*); Brown v. Neal, 36 Me. 407; Atlantic Co. v. Maryland Co., 62 Md. 135; Perkins v. Hackleman, 26 Miss. 41; Pearson v. Inlow, 20 Mo. 322; Herdic v. Young, 55 Pa. 176; Luttrell v. Hazen, 3 Sneed, 20; Small v. Ball, 47 Vt. 486; Hazleton v. Week, 49 Wis. 661 *Accord.* — Ed.

site to that which was occupied by the wagon. The defendant drove between the coach and the wagon; and though in the interval there was room for two or three carriages abreast, the horse of the defendant plunged, and, running the shaft of the gig against one of the plaintiff's wagon horses, so injured him that he afterwards died.

The defence set up was that the defendant's horse, being frightened by the near, noisy, and rapid approach of a butcher's cart, became ungovernable; that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of the defendant, he was not in any way responsible for the consequences. The weight of evidence, however, went to establish that the defendant's horse was young and spirited; that he had no curb-chain; that the defendant in his alarm pulled the wrong rein; and that he ought to have continued in a straight course, allowing the coach to pass between him and the wagon.

The learned judge who presided directed the jury, after a full summing up, that, this being an action of trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable; nor was he requested to do so by the defendant's counsel. The jury found a verdict for the plaintiff.

*Pell*, Serjt., now moved for a new trial, on the ground of an alleged misdirection.

*Vaughan*, Serjt., opposed the rule.<sup>1</sup>

DALLAS, C. J. If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the court. The action was trespass, and the trespass was clearly made out against the defendant. It has been contended, indeed, that the defendant would not have been liable under any form of action; but, upon the facts of the case, if I had presided at the trial, I should have directed the jury that the plaintiff was entitled to a verdict; because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do; and, under all the circumstances, I am of opinion that a new trial ought not to be granted in this case.

BURROUGH, J., concurred, and the rule was discharged.<sup>2</sup>

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> *Payne v. Smith*, 4 Dana, 497 Accord. — ED.

## HOBART v. HAGGET.

SUPREME JUDICIAL COURT, MAINE, APRIL TERM, 1835.

[Reported in 3 *Fairfield*, 67.]

TRESPASS for the alleged taking and converting to his own use by the defendant, of an ox, the property of the plaintiff. The general issue was pleaded and joined. *Verdict for the plaintiff.*<sup>1</sup>

PARRIS, J. The ox taken by the defendant was the property of the plaintiff; and although the defendant attempted to prove that he purchased that ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser; but unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question, when, in fact, the plaintiff supposed he was not selling that ox, but another, that they would find for the plaintiff. The jury, having found for the plaintiff, have virtually found that he did not sell the ox in controversy; and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that, where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes by mistake the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson v. York* was still stronger than either of those above supposed. In that case one Kenniston hired the defendant to take a cargo of wood from Burnt Coat Island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board his vessel and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A

<sup>1</sup> The statement of facts, the arguments of counsel, and a part of the opinion not relating to trespass are omitted. — Ed.



mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*. Nor is the intent or design of the wrong-doer the criterion as to the form of remedy, for there are many cases in the books where, the injury being direct and immediate, trespass has been holden to lie though the injury were not intentional, as in *Guille v. Swan*,<sup>1</sup> where the defendant ascended in a balloon which descended into the plaintiff's garden; and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damage done to the garden. In this case Spencer, C. J., said, "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See also 1 Pothier, art. 1, § 1; 1 Sumner, 219, 307.

These exceptions are overruled, and there must be

*Judgment on the verdict.*<sup>2</sup>

<sup>1</sup> 19 Johns. 381.

<sup>2</sup> *Hamilton v. Hunt*, 14 Ill. 472; *Stanley v. Gaylord*, 1 Cush. 536, 551; *Sinclair v. Tarbox*, 2 N. H. 135; *Johnson v. Stone*, 40 N. H. 197; *Cate v. Cate*, 44 N. H. 211; *Gray v. Stevens*, 28 Vt. 1; *Daxter v. Cole*, 6 Wis. 319 *Accord.* — Ed.

SECTION VI. (*continued.*)

(b) LEAVE AND LICENSE.

LATTER v. BRADDELL, WIFE, AND ANOTHER.

IN THE COMMON PLEAS DIVISION, NOVEMBER 26, 27, 1880.

[Reported in 50 *Law Journal Reports*, *Common Law*, 166.]

THIS was an action for damages for an assault, tried before Lindley, J., at the last Manchester assizes. At the trial the learned judge withdrew the case from the jury as against Captain and Mrs. Braddell, on the ground that there was no evidence of the non-consent of the plaintiff on which the jury could reasonably act. The jury found a verdict for the defendant, the doctor. A rule was obtained calling on the defendants to show cause why the verdict should not be set aside and a new trial had on the ground that the learned judge wrongly withdrew the case from the jury as against the defendants Braddell, and that the verdict was against the weight of evidence.

The facts and arguments appear sufficiently from the judgment delivered.

*Addison* showed cause.

*Murphy* and *Jordan* supported the rule.

The following cases were cited in support of the argument against the rule: *Christopherson v. Bare*<sup>1</sup>; *The Queen v. Lock*.<sup>2</sup>

The following judgment was (on Dec. 3) delivered by

LINDLEY, J. I am of opinion that, assuming everything said by the plaintiff in this case to be true, a verdict in her favor against the master and mistress could not be supported in point of law, and that as to them she was properly nonsuited.

The plaintiff was in service with the defendants Braddell, who on their return after an absence from home received information from the charwoman which caused Mrs. Braddell to bid the plaintiff leave her service by twelve o'clock on the day that order was given, as she was in the family way. The plaintiff denied this, and Mrs. Braddell then said, "Well, the doctor will be here directly, and we shall then see." The plaintiff was then told to go to her bedroom, and she went, whither the doctor on his arrival followed her. He told her to take off her garments, which she did, saying, however, "Must I take off this?" or that she "did not like to take off that," as each article of clothing had to be removed by her under the doctor's directions. She also said that she cried and protested, and that it was all done without her consent. The examination was, however, submitted to by her, and the doctor

<sup>1</sup> 11 Q. B. Rep. 473; 17 Law J. Rep. Q. B. 109.

<sup>2</sup> 42 Law J. Rep. M. C. 5; Law Rep. 2 C. C. R. 10.

found that the plaintiff was not in the family way. This is the assault complained of.

The plaintiff's case cannot be put higher than this, namely, that, without consulting her wishes, her mistress ordered her to submit to be examined by a doctor, in order that he might ascertain whether she (the plaintiff) was in the family way, and that she (the plaintiff) complied with that order reluctantly — that is, sobbing and protesting — and because she was told she must, and she did not know what else to do. There was, however, no evidence of any force or violence, nor of any threat of force or violence, nor of any illegal act done or threatened by the mistress beyond what I have stated; nor did the plaintiff in her evidence say that she was in fear of the mistress or of the doctor, or that she was in any way overcome by fear. She said she did not consent to what was done; but the sense in which she used this expression was not explained, and to appreciate it regard must be had to the other facts of the case. The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress's orders, and there was no evidence whatever to show that anything improper or illegal was threatened to be done if she had not complied. It was suggested that her mistress ordered the examination with a view to see whether she could dismiss her without paying a month's wages. But there was no evidence of any threat to withhold wages, nor of any conversation on the subject of wages, until the plaintiff was paid them on leaving. The question, therefore, is reduced to this: Can the plaintiff, having complied with the orders of her mistress, although reluctantly, maintain this action upon the ground that what was done to her by the doctor was against her will, or might properly be so regarded by a jury? I think not. It is said that the jury ought to have been asked whether the plaintiff in effect gave her mistress leave to have her examined, or whether the plaintiff's will or mind went with what she did. But, in my opinion, such questions inadequately express the grounds on which alone the defendants can be held liable. The plaintiff was not a child; she knew perfectly well what she did and what was being done to her by the doctor. She knew the object with which he examined her, and upon the evidence there is no reason whatever for supposing that any examination would have been made or attempted if she had told the doctor she would not allow herself to be examined. Under these circumstances I am of opinion that there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress's orders, and that in the absence of all evidence of coercion, as distinguished from an order which the plaintiff could comply with or not as she chose, the action cannot be maintained.

I have examined all the decisions I can find on assault, battery, duress and allied subjects, but I can find no authority in support of such an action as this. The cases most favorable to the plaintiff are those like *Atkinson v. Denley*,<sup>1</sup> in which money paid under compulsion

<sup>1</sup> 6 Hurl. & N. 778; affirmed 7 *ibid.* 934; 30 Law J. Rep. Exch. 361.

in the sense of unfair or improper dictation or oppression has been recovered back. But in all such cases there has been another element, namely, either mistake or no consideration, or an illegal consideration, for the payment in addition to the element of coercion; and, in my opinion, such cases are no guide for the proper determination of an action for assault and battery.

A question somewhat like this arose incidentally in *Biffin v. Bignell*,<sup>1</sup> in which a jury had to consider whether a wife had been forced by her husband to live apart from him. She had been properly confined in a lunatic asylum. Shortly before she was discharged cured her husband offered her an allowance if she would live apart from him, but if she would not he said he would send her to another asylum. She accepted his terms, came out of the asylum and lived apart from her husband, who paid her the stipulated allowance, but who was afterwards sued for her board and lodging. Baron Bramwell told the jury that the agreement would not be binding on the wife if her assent to it was obtained by the threat that if she did not consent she would be sent to another asylum. But the court held that this was a misdirection, on the ground that the threat, such as it was, did not amount to duress or anything like.

In the present case there was no evidence of any threat at all, in the event of non-compliance with the orders of the mistress; and it appears to me that there was no evidence to show that Mrs. Braddell did anything illegal, or, in other words, to show that what she ordered to be done was done against the plaintiff's will in any accurate sense of that expression. This, however, is what has to be established. See *Christopherson v. Bare*.<sup>1</sup>

I do not, however, wish to be understood as being of opinion that the plaintiff had no cause of complaint against her mistress; but, in my opinion, the real substantial grievance was that the plaintiff accused of being in the family way was ordered to be examined, and when the accusation proved to be unfounded was summarily dismissed without any apology. Whether the mistress could or could not have justified such harsh conduct I cannot say, not having heard her evidence. But, harsh as such conduct apparently was, it does not affect the question on which this action turns. I cannot, however, help thinking that if the conduct of the mistress as regards the manner of dismissal had been more considerate, the impossibility of maintaining this action would be more plainly apparent.

As regards the doctor, who is made a defendant, I am of opinion, for the reasons already given, that there was no misdirection in point of law, and that the verdict in his favor was perfectly correct. His conduct throughout was kind and considerate; and whatever grievance the plaintiff may have against her mistress, she has none

<sup>1</sup> 7 Hurl. & N. 877; 31 Law J. Rep. Exch. 189.

<sup>2</sup> 11 Q. B. Rep. 473; 17 Law J. Rep. Q. B. 109.

whatever against the doctor. This action has been tried twice, and although I am extremely reluctant to adhere to my own opinion when other persons who are more likely than I am to be right think I am wrong, I cannot give my voice for further litigation in a case in which I feel convinced no injustice has been done.

I am of opinion that this rule ought to be discharged.

*Rule discharged.<sup>1</sup>*

## HEGARTY v. SHINE.

IN THE COURT OF APPEAL, IRELAND, DECEMBER 2, 1878.

[*Reported in Law Reports, 4 Irish, 288.*]

THE LORD CHANCELLOR.<sup>2</sup> This action is brought by a female plaintiff against a male defendant for breach of promise of marriage, and for assault of the plaintiff, and infecting her with venereal disease; the second ground of complaint being stated in two counts, of which the first is expressed that the defendant assaulted and beat the plaintiff, whereby she became infected with venereal disease, and the second, that the defendant assaulted and beat the plaintiff, and infected her with venereal disease. Of the first cause of action (for breach of promise of marriage) there was upon the trial no evidence. The rest of the complaint was founded upon the following facts: Between the plaintiff and the defendant there had for about two years subsisted an illicit intercourse, and during its continuance the plaintiff contracted from the defendant disease. As the questions to be decided by us arise upon the charge of the learned judge before whom the trial took place, and in respect of the view taken by him of the legal considerations applicable to a case of this character, I think it unnecessary to enter into the details of the evidence. There was a verdict for the plaintiff, but, if the jury were misdirected, of course it cannot be upheld. The charge is reported by the learned judge in the terms which I shall now state:—

“I charged the jury, carefully reviewing the evidence. Without expressing any opinion on my own part, I adopted as law, and, as applicable to a civil action, the cases of *Reg. v. Bennett*,<sup>3</sup> and *Reg. v. Sinclair*,<sup>4</sup> and I in substance directed the jury, as matter of law, that an assault implied an act of violence committed upon a person against

<sup>1</sup> The dissenting opinion of LOPES, J., is omitted. The Court of Appeal (BRAMWELL, BAGGALLAY, and BRETT, L. J.) sustained Mr. Justice Lindley. 50 L. J. C. L. 448.—ED.

<sup>2</sup> PALLES, C. B., and DEASY, L. J., concurred with the Lord Chancellor (the Right Hon. John Thomas Ball). Their opinions and the arguments of counsel are omitted.—ED.

<sup>3</sup> 4 F. & F. 1105.

<sup>4</sup> 13 Cox, C. C. 28.

his or her will, and that, as a general rule, when the person consented to the act there was no assault; but that if the consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in the view of the law an assault; and that therefore, if the defendant, knowing that he had venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her venereal disease, fraudulently concealed from her his condition, in order to induce, and did thereby induce, her to have connection with him, and if but for that fraud she would not have consented to have had such connection, and if he had with her the connection so procured, and thereby communicated to her such venereal disease, he had committed an assault, and one for which they might on the evidence award substantial damages."

This charge and the objections to it were brought before the Queen's Bench Division, when a majority of the judges held that the views presented by the learned judge to the jury (not, indeed, according to his own opinion, but in deference to the authority of the two cases in the criminal courts cited by him) were a misdirection, and they consequently awarded a new trial upon this ground. The propriety of this ruling we have now to examine.

The charge of the learned judge assumes that, in order to constitute an assault upon a person, the act done should be against his or her will, without his or her consent. With that proposition I entirely agree. To strike a person minaciously or in anger is a matter very different in character from a blow in sport or play. Sexual intercourse with the consent of the female (supposing no grounds for invalidating that consent) cannot be an assault on the part of the male. The charge then proceeds to assert that although consent be given, yet if that consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in view of the law an assault. From this proposition, when laid down in reference to the particular facts of the present case, I dissent. We are not dealing with deceit as to the nature of the act to be done, such as occurred in the instance cited in argument, of the innocent girl who was induced to believe that a surgical operation was being performed. There was here a lengthened cohabitation; deliberate consent to the act or acts, out of which the cause of action has arisen. If deceit by one of the parties to such a cohabitation as to the condition of his health suffices to alter the whole relation between them, so as to transform their intercourse into an assault on his part, why should not any other deceit have the same effect? Suppose a woman to live with her paramour, under and with a distinct and reiterated promise of marriage, not fulfilled, nor, it may be, ever intended to be fulfilled—is every separate act of sexual intercourse an assault? Let the same happen in conjunction with a violated engagement to provide for her maintenance and protection against poverty—does a similar consequence here also follow? No one, I think, would be prepared to answer these questions in the affirmative.

In the present case, the fraud relied upon to annul the plaintiff's consent is the concealment of a fact which if known would have induced her to withhold it; but before this effect is attributed to such concealment, it seems to me reasonable to demand — what is required in contract — that from the relation between the parties there should have arisen a duty to disclose, capable of being legally enforced. And how can this be, when the relation is itself immoral and for the indulgence of immorality; the supposed duty with the object of aiding its continuance? To support obligation founded upon relation, it appears to me the relation must be one that we can recognize and sanction. I do not think these opinions conflict with the cases in criminal courts referred to by the learned judge in his charge. Considerations affect prosecutions not applicable to civil actions. In the former we are concerned with public interests and consequent public policy; in the latter, with the reciprocal rights and liabilities of individuals. Mutual consent to a prize-fight might prevent the pugilists having a remedy *inter se*; but would not make it less a breach of the peace, or exonerate those engaged from punishment.

These reasons, in my opinion, justify the order of the Queen's Bench Division directing a new trial upon the ground of misdirection by the learned judge. I think it right to add that I also concur with the majority of that court in holding an action of this character cannot be maintained. The consequence of an immoral act — the direct consequence — is the subject of complaint. Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts, than to aid or enforce those acts or contracts themselves. Some striking illustrations of this are afforded by authorities cited in the argument of this appeal. Thus judges have refused to partition the plunder obtained by robbery, to acknowledge or protect property in an indecent book or picture, to compel payment of the wages of unchastity. Are the same tribunals to regulate the relative rights and duties of the parties to an illicit intercourse? No precedent has been cited, no authority suggested, for an action like the present; and I am not disposed to make, in the interest of immorality, either precedent or authority for it.

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### HAMILTON v. LOMAX.

SUPREME COURT, NEW YORK, MARCH, 1858

[Reported in 26 Barbour, 615.]

MOTION by the defendant in an action for seduction, to be discharged from arrest. The plaintiff, Janet Hamilton, was twenty, and the defendant, seventeen years of age. It appeared in evidence that the intimacy between the parties commenced at Toronto, Canada; that the parties

came to the city of New York together, under the pretended relationship of brother and sister; that they there had connection with each other, and the defendant promised to marry the plaintiff. The promise of marriage was corroborated by the evidence of a Mr. Nash, who heard the defendant say he intended to marry the plaintiff when he heard from his father, who lived at Manchester, in England.

INGRAHAM, J. No complaint is submitted, on the motion, if any has been served, and it is difficult to say whether the arrest was originally intended to have been for a breach of promise of marriage, or for seduction. Upon the argument of the motion, the plaintiff's counsel stated it was not for the breach of promise of marriage, and sought to sustain it for the seduction.

The evidence so fully establishes the infancy of the defendant that no attempt has been made to contradict it, and this fact has probably led to the abandonment of any proceeding for the breach of such a promise. The cases of *Hunt v. Peake*<sup>1</sup> and *Holt v. Ward*<sup>2</sup> fully establish that a promise of marriage by an infant is not binding, and an action for the breach thereof cannot be maintained. See also *Cameron v. Alebay*.<sup>3</sup> The ground on which the plaintiff claimed to sustain the arrest was for the seduction, alleging that the plaintiff had been defrauded by the false promise of the defendant. In no instance, however, is a promise to do something *in futuro* sufficient to sustain an action for deceit. All promises to pay money in consideration of goods to be sold, or for services to be rendered, are of the same character; and although they are not performed, still no action for fraud can be maintained upon them: the action must be on the promise itself. This case does not show any representation, or any promise, other than the promise to marry. So careful have the courts been to keep these causes of action separate, that in a case for seduction it was held to be erroneous to admit evidence of a promise of marriage, in attempting to prove the seduction. *Gillet v. Mead*.<sup>4</sup> No case has been cited to show that a person seduced could maintain an action for such seduction, because the person seduced assents thereto. The only mode in which the action has ever been maintained has been by bringing such action in the name of some person having a right to the services of the person seduced, and allowing damages to be recovered, not only for actual loss of service, but for a sum sufficient also to punish the seducer; but such action can never be maintained in the name of the party seduced.

In the present case, from the plaintiff's own statement, it appears that she is under twenty-one years of age, and lived with her mother. The latter has a right to bring an action for the loss of service of her daughter. In that action full recompense could be obtained for any injury caused by the defendant.

The statement of the plaintiff's first acquaintance with the defendant, as given by herself, is not of such a character as to relieve the

<sup>1</sup> 5 Cow. 475.

<sup>2</sup> 2 Strange, 937.

<sup>3</sup> 1 Maul. 76.

<sup>4</sup> 7 Wend. 193.



case from suspicion. She states that her first acquaintance with the defendant was in the streets of Toronto after dark, and that she remained with him three-quarters of an hour, in the street; and her subsequent statements of her relations with him throw much doubt upon any supposed attempts of the defendant to deceive her. It is enough, however, to say that the law does not give the plaintiff a right of action, in her own name, for the seduction. It may be that there are some cases where such an action, if allowed, would give a party the redress to which she is entitled; but the Legislature has not thought fit to authorize such an action to be brought, and until they do, the courts have no authority to sanction the bringing of it. As the law now permits parties to be witnesses in their own behalf, some of the difficulties which have heretofore stood in the way of allowing a female who has been seduced to maintain an action in her own name have been obviated; but it is for the Legislature, and not the courts, to apply the remedy.

*The defendant must be discharged.*<sup>1</sup>

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### PATRICK FITZGERALD v. JOHN CAVIN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1872.

[Reported in 110 Massachusetts Reports, 153.]

TORT for an assault. At the trial in the Superior Court, before Putnam, J., the plaintiff testified that the defendant seized hold of him by the testicles, and squeezed them severely. The defendant introduced evidence that "all that occurred happened in the course of fooling and 'playing with each other,' and that there was no malice, anger or hard words." It appeared that the plaintiff was seriously injured, but that a very slight force applied to the testicles might do serious injury, and that the plaintiff made no complaint until half an hour after the occurrence.

The defendant requested the judge to rule as follows: "1. If there was no malice on the part of the defendant and no intent to do the plaintiff any bodily harm, and if the parties were lawfully playing with one another, by mutual consent, and the *force used* [act done] by the defendant was no *greater* [other] than the defendant had good reason to believe would be in such play, the defendant is not liable. 2. Whether or not the force used was reasonable, is not to be determined by the results, but from the evidence of the force used at the time and the

<sup>1</sup> Beseler v. Stephani, 71 Ill. 400; Woodward v. Anderson, 9 Bush, 624; Paul v. Frazier, 3 Mass. 71; Robinson v. Musser, 78 Mo. 153; Weaver v. Bachert, 2 Barr, 80; Conn. v. Wilson, 2 Overt. 233 *Accord.* See Desborough v. Homes, 1 F. & F. 6.

An action is allowed by statute in some jurisdictions. McIlvain v. Emery, 88 Ind. 298; Watson v. Watson, 49 Mich. 540; Hood v. Sudderth (N. C. 1892), 16 S. E. R. 397. The Scotch law is to the same effect. Smith, Law of Damages, 128. — Ed.

circumstances of the occasion. 3. The plaintiff cannot recover unless it is proved that the defendant intended to do bodily harm."

The judge gave the first ruling requested, substituting the words in brackets for those in italics. He gave the second ruling requested, adding however these words "and the nature of the act done by the defendant." He refused to give the third ruling requested, and ruled "that if the defendant intended to do the act done by him, and that act was unlawful and unjustifiable" (instructing them as to when such an act would be unlawful and unjustifiable), "and the act caused bodily harm, the plaintiff could recover."

The jury returned their verdict for the plaintiff for \$933.33; and the defendant alleged exceptions.

*G. M. Stearns* (*M. P. Knowlton* with him), for the defendant.

*E. B. Gillett* (*H. B. Stevens* with him), for the plaintiff.

By THE COURT. The rulings were sufficiently favorable to the defendant. *Exceptions overruled.*<sup>1</sup>

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### WARTMAN v. SWINDELL.

IN THE COURT OF ERRORS AND APPEALS, NEW JERSEY,  
NOVEMBER 14, 1892.

[Reported in 25 Atlantic Reporter, 356.]

VAN SYCKEL, J.<sup>2</sup> In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the court-house, and again demand the lines of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below, the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was

<sup>1</sup> See also *Markley v. Whitman* (Mich. 1893), 54 N. W. R. 763; *Reid v. Mitchell*, 12 R. (Court of Session, 1885) 1129. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

done for when it was first done." When the plaintiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground *de minimis non curat lex*." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court. The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim *de minimis non curat lex* applicable to this case. In *Seneca Road Co. v. Auburn & R. R. Co.*,<sup>1</sup> Mr. Justice Cowen said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated *Six Carpenters' Case*<sup>2</sup> involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable. In my opinion, the trial court erred in dismissing this case, and the judgment below should therefore be reversed.

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### THE STATE v. WILLIAM BECK AND OTHERS.

IN THE COURT OF APPEALS, SOUTH CAROLINA, DECEMBER, 1833.

[Reported in 1 Hill, 363.]

TRIED before Mr. Justice Richardson, at Pickens.

Indictment for an assault and battery. The defendants were all acquitted, except William Beck. The facts were these—one of the defendants had lost leather, and suspecting it was stolen, got Beck and the other defendants to aid him in the search. They found the leather on the premises of Noble Anderson, and immediately took him into custody, whether under a warrant or not, did not appear. Whilst in this state, some one, not Beck, asked Anderson if he would not rather be whipped than go to jail? He replied he would, and then requested Beck to whip him. Beck at first hesitated, but finally, at the earnest entreaty of Anderson, and saying, "if it will oblige you I will do it," consented; and Anderson putting his arms round a tree, he gave

<sup>1</sup> 5 Hill, 175.

<sup>2</sup> 8 Coke, 432.

him a few stripes with a switch. Anderson was then released, but was afterwards prosecuted, convicted and punished for stealing the leather. Under these circumstances, the presiding judge charged the jury, that Beck was clearly guilty, and they found accordingly. He now moves for a new trial, on the ground that the whipping having been inflicted at the importunity of Anderson, and against the inclination of the defendant, was not an assault and battery.

*Burt*, for the motion.

*Thompson, Sol.*, contra.

HARPER, J. We do not think the act in question amounts to an assault and battery, on the part of the defendant, Beck. A battery is generally defined to be, any injury done to the person of another, in a rude, insolent, or revengeful way. There is also another class of cases, where some degree of negligence may be imputed: as, where a person throwing stones into the highway, strikes another passing; or, as in the instance of a person throwing a lighted squib into a crowd. But where there is no intention to injure, and no negligence, I do not think the offence can be imputed. An instance commonly put, is that of a soldier firing his piece at muster, and, without any fault of his own, injuring another, casually and suddenly passing before it. A surgeon who, for his patient's health, cuts off a limb, is not guilty of mayhem; or if one plucks a drowning man out of a river by the hair of the head, this is no assault. If, according to the prescription of the physician in the Arabian Nights, a physician should beat his patient with a mallet, for the *bona fide* purpose of restoring his health, though this might be malpractice, it would be no battery. Where one gave another a license to beat him, there is a case in which it is said, the license was held to be void. This may well be. The person receiving the license, entertained hostile dispositions towards the other, and upon being thus licensed, proceeded to carry his revengeful purpose into effect. But in the case before us, the defendant had no evil disposition towards Anderson, but the contrary; and at his own earnest request, and to save him from what he considered a greater evil, reluctantly consented to inflict the stripes. However ill judged the act may have been, I cannot think it constituted an assault and battery. The case might be different with respect to the other defendants who were acquitted; but as to the defendant before us, the motion for a new trial must be granted.

JOHNSON and O'NEALL, JJ., concurred.<sup>1</sup>

<sup>1</sup> "In *State v. Beck*, 1 Hill (S. Ca.), 363, the opinion contains statements of law in which we cannot concur." — *Per* ENDICOTT, J., in *Commonwealth v. Colburg*, 119 Mass. 350, 354. — ED.

## BELL v. HANSLEY.

SUPREME COURT, NORTH CAROLINA, DECEMBER TERM, 1855.

[Reported in 3 Jones, 131.]

THIS was an action of trespass, assault, and battery, tried before Ellis, Judge, at the fall term, 1855, of New Hanover Superior Court.

The plaintiff proved the assault and battery; and there was evidence tending to show a mutual affray and fighting by consent.

The defendant called upon his Honor to instruct the jury that, if the parties mutually assented to and participated in a breach of the peace, the plaintiff could not recover.

But his Honor was of opinion, and so advised the jury, that notwithstanding the fact that the parties had mutually assented to an affray, the plaintiff was, nevertheless, entitled to recover; but that the fact relied on as a defence was proper to be considered by the jury in mitigation of damages. The defendant excepted to these instructions.

*Verdict for the plaintiff. Judgment and appeal.*

*Reid*, for plaintiff.

*W. A. Wright*, for the defendant.

NASH, C. J. This case presents the question whether, when two men fight together, thereby committing an affray, either is guilty of an assault and battery upon the other. Justice Buller, in his *Nisi Prius*, at page 16, says, Each does commit an assault and battery upon the other, and that each can maintain an action for it. He refers to a case at Abingdon, *Boulter v. Clark*, when Serjeant Hayward appeared for the defendant, and offered to prove that the parties fought by consent, and insisted that this, under the maxim *volenti non fit injuria*, applied. Parker, Chief Baron, denied it, and said, "The fighting being unlawful, the consent of the plaintiff to fight would be no bar to his action, and that he was entitled to a verdict." Mr. Stephens, in his *Nisi Prius*, 211, lays down the same doctrine: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury."

*Per Curiam. Judgment affirmed.*<sup>1</sup>

<sup>1</sup> *Logan v. Austin*, 1 Stewart (Ala.), 476; *Cadwell v. Farrell*, 28 Ill. 438; *Adams v. Waggoner*, 33 Ind. 531; *Grotton v. Glidden*, 84 Me. 589; *Commonwealth v. Colburg*, 119 Mass. 351 (*semble*); *Jones v. Gale*, 22 Mo. Ap. 637; *Stout v. Wren*, 1 Hawks (N. Car.), 420; *Barholt v. Wright*, 45 Oh. St. 177 (explaining *Champer v. State*, 14 Oh. St. 437); *McCune v. Klein*, 60 Tex. 168 (*semble*); *Shay v. Thompson*, 59 Wis. 540 *Accord*.

*Reg. v. Coney*, 15 Cox, C. C. 46 (*semble*) *per* HAWKINS, J.; *Hegarty v. Shine*, L. R. 4 Ir. 288, 294 (*semble*) *Contra*. — ED.

## ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1436.

[Reported in *Year-Book*, 14 Henry VI., folio 14, placitum 2.]

FALSE IMPRISONMENT brought by a woman for an imprisonment in Fleet Street.

*Newton*. There was an agreement between the plaintiff and defendant at G. that the defendant should carry the plaintiff to Temple Bar, and thence to Southwark, in pursuance of which agreement he carried the woman to Temple Bar, and thence to Temple Bridge, and across the Thames to Southwark, which is the said imprisonment, &c.

This was held to be no plea, because it did not confess any imprisonment, for the carrying of a woman by her consent cannot be called an imprisonment. There cannot be an imprisonment, unless against her will. Nevertheless, the plaintiff passed over.

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## MOSES v. DUBOIS.

COURT OF APPEALS, SOUTH CAROLINA, FEBRUARY, 1838.

[Reported in *Dudley*, 209.]

THIS was an action for false imprisonment against the captain of a steamboat, for carrying Sol. Moses (deputy-sheriff) to Norfolk against his will.

The jury returned a verdict of one hundred dollars.

*Petigrue* and *Lesesne*, defendant's attorneys; *Yeadon* and *McBeth*, contra.<sup>1</sup>

EARLE, J., delivered the opinion of the court:—

Every unlawful restraint of personal liberty is an imprisonment, whether accompanied by corporal touch or not; whether in a house, in a ship, or in the street. But force of some sort must be used, and it must be a detention against the will; and it is indispensable that these two circumstances should unite. The force may be exhibited in a variety of ways without actual assault or corporal touch,—by locking a door after enticing one within, and refusing to open it for his departure; by setting sail or pushing off from shore, having one on board, and refusing to allow him to go ashore; or by detaining one on the highway by threats of personal violence if he departed. And it is equally essential that the person should be detained against his will; for if he voluntarily place himself in a situation where another may

<sup>1</sup> The case is materially abridged. — ED.

lawfully do that which has the effect of restraining liberty, especially if he refuse to depart when he may, he cannot complain that he is unlawfully imprisoned against his will. A sheriff's officer goes to the house of A. on the evening of an entertainment, with a bail process against one of his guests, and enters, as he lawfully may, and makes the arrest, A. refusing to assist him, but offering no hinderance; being unable to remove his prisoner, he chooses to remain until the close of the entertainment, expecting then to accomplish his purpose on the departure of the guests; but the prisoner, being on a visit there, remains. The officer, being informed that the doors are about to be closed, is requested to depart with his prisoner, if he can take him, else without him; but he is unable to take, and refuses to go without him. If A. should lock his doors and retire to rest, could the officer complain of false imprisonment if A. should refuse to rise at a late hour of the night, at his request, to open the door? I should think not. If a man enters a tavern and continues there all night against the will of the landlord, it is a trespass, — could he complain if the landlord shuts his door upon him? The general rule is, that a trespass will not lie for a mere non-feasance; and it seems to follow from that proposition that when an act has been done, in the first instance lawful in itself, it cannot be rendered unlawful *ab initio*, except by some positive act incompatible with the exercise of the legal right to do the first act. 20 John. Rep. 429; 15 ib. 401. In the case made by the evidence it does not appear that the plaintiff was carried from the shore against his will, but the reverse. The destination of the boat was known, — the accustomed hour of departure was passed; the boat was in the act of getting under way; at that moment the plaintiff chose to go on board to arrest a person on a bail process, evidently under a mistaken impression as to the extent of his authority; and, seeing the boat leaving the wharf, he chooses to remain. Here, then, there was no unlawful detention, according to the principles I have laid down: the defendant was in the discharge of his known and accustomed duty, and therefore in the performance of a lawful act, and the plaintiff was not detained against his will. At what time did the false imprisonment commence? After the boat had proceeded into the stream some distance from the wharf, the defendant came and proposed to the plaintiff to send him ashore with his prisoner, if he could take him, else to send him alone. The plaintiff refused to go unless the defendant would aid him in carrying his prisoner. It need not be repeated that this the defendant was not bound to do. It was his duty to interpose no obstacle to the arrest or removal of the prisoner, but rather to afford such facilities as he could to the service of legal process. This he seems to have done, and more could hardly have been expected. On the refusal of the plaintiff to go ashore, the defendant proceeded on his voyage, — one on which the plaintiff knew the boat was in the act of departing when he went aboard. This was also the accustomed duty, the office of the defendant, and was therefore a lawful act.

If the defendant was not bound to aid in the arrest and removal of the prisoner, I do not perceive that he was bound either to delay his voyage or put back his boat to enable the plaintiff to procure assistance. When the boat had arrived at the mouth of the harbor, near Sullivan's Island, the plaintiff demanded to be put ashore, which the defendant then refused; here commenced the detention of the plaintiff against his will. Was it unlawful? I think it cannot be so held; the defendant only proceeded on his voyage. His refusal to send the plaintiff ashore at that time, which would have delayed his progress and put him to trouble, was a mere non-feasance, which, if he had been guilty of no trespass up to that time, did not render him a trespasser *ab initio*: it was not a positive act, incompatible with the legal exercise of the right to proceed from the wharf, the plaintiff being on board.

*The motion for a new trial is granted.*<sup>1</sup>

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### ADAMS v. FREEMAN.

IN THE SUPREME COURT, NEW YORK, OCTOBER, 1815.

[Reported in 12 Johnson, 408.]

IN ERROR, on *certiorari* to a justice's court.

This was an action of trespass, brought by the plaintiff in error against the defendant in error for entering the plaintiff's house. The defendant pleaded not guilty; and, on the trial, the plaintiff proved that, he being in bed (whether in the day time or at night is not stated), the defendant entered his house without permission. The plaintiff's son, by order of his father, requested the defendant to leave the house; to which the defendant answered that he would go when he pleased. The plaintiff's wife then ordered the defendant to go off, to which the defendant gave a similar answer. The plaintiff then rose from bed, and ordered the defendant to leave his house, but he still refused to go, and remained there half an hour, without doing any other injury, and then departed.

The defendant moved for a nonsuit, and the justice decided that the proof was insufficient to sustain the action, and nonsuited the plaintiff, with costs.

PER CURIAM. To enter a dwelling house without license is, in law, a trespass. Any person professing to keep an inn, thereby gives general license to all persons to enter his house. But the house of the plaintiff does not appear to have been an inn, and, therefore, to render such an entry lawful, there must be a permission, express or implied; and familiar intimacy may be evidence of general license for

<sup>1</sup> Spoor v. Spooner, 12 Met. 281 Accord. — Ed.



such purpose. According to the evidence, here was no such permission; and, therefore, the act of entering the plaintiff's house was a trespass. Besides, if the defendant had received permission to enter, as by being asked to walk in, upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> See *Ditcham v. Bond*, 3 Camp. 524; *McKone v. Mich. Co.*, 51 Mich. 601; *Haight v. Badgeley*, 15 Barb. 502; *Martin v. Houghton*, 45 Barb. 258; *Gowen v. Phila. Co.*, 5 Watts & S. 141, 143; *Kay v. Pennsylvania Co.*, 65 Pa. 273.

A purchaser of goods upon the seller's premises is authorized to enter and take them, unless the goods were by the bargain deliverable by the seller elsewhere. *Wood v. Manley*, 11 A. & E. 34; *Williams v. Morris*, 8 M. & W. 488; *Heflin v. Bingham*, 56 Ala. 566; *Russell v. Stoeckel*, 5 Houst. 464; *Miller v. State*, 39 Ind. 267; *Giles v. Simonds*, 15 Gray, 441; *McLeod v. Jones*, 105 Mass. 403; *Fletcher v. Livingston*, 153 Mass. 388.

A divorced wife may enter her former husband's house to get her personal property. *Kallock v. Perry*, 61 Me. 273. — ED.

SECTION VI. (*continued*).

## (c) DEFENCE OF SELF AND CLOSELY ALLIED PERSONS.

## ANONYMOUS.

AT THE ASSIZES, CORAM METINGHAM, J., 1294.

[*Reported in Year-Book, 21 and 22 Edward I., 586.*]

ONE Adam brought the *quare vi et armis* against B., saying that he tortiously, &c., and beat and wounded him, &c. B. said that he did not come with force and arms, &c., but that the said Adam, who now complains, came and attacked him, and would have slain him; so that if Adam did receive any harm from him, it was in his (B.'s) own defence, and that the matter was settled *in pais* for two marks; ready to aver it, &c. *Adam*. What have you to show that we settled the matter? *B.* A good jury. *Adam*. We think that this is not sufficient. METINGHAM. Answer if you settled the matter for two marks or not. *Adam*. We did not settle the matter; ready, &c. And the other side said the contrary. So, &c.

## ANONYMOUS.

IN THE KING'S BENCH, EASTER TERM, 1319.

[*Reported in Year-Book, 12 Edward II., folio 381.*]

IN a plea of trespass for a battery, the defendant pleaded Not guilty. It was found by the inquest that the plaintiff was beaten, but this was because of his own assault, since the defendant could not otherwise escape; so that he brought this action out of malice; and the defendant prayed the discretion of the justices. It was nevertheless adjudged that the plaintiff should recover his damages according to the verdict of the inquest, and the defendant to go to prison. *Per* STAUNTON and HERLE.<sup>1</sup>

<sup>1</sup> Compare Fleta, i. 23, § 15: "Sed si talis . . . vincatur per patriam, quod id fecit per infortunium vel se defendendo, tunc remittatur gaolæ et cum regi super facti veritate certioetur, GRATIOSE DISPENSABIT cum tali, salvo jure ejuslibet." 1 Seld. Soc. Sel. Pl. Cor. (1212), No. 114, and 3 Bract. Note Book (1236-37), No. 1216, are cases in point.

Y. B. 21 Ed. III., fol. 17, pl. 22: "Note that a man was found guilty of having killed another in self-defence, and nevertheless his chattels were forfeit, although his life was saved. This was because at common law a man was hanged in such a case straightway, just as if he acted feloniously. And although the king now by the statute has saved (*relesse*) his life, his chattels remain at common law." See Stephen, Cr. Law (2d ed.), 136.

That the early English law looked only at the act of a defendant, regardless of his

## CHAPLEYN OF GREYÈ'S INNE v. —.

IN THE EXCHEQUER, MICHAELMAS TERM, 1400.

[Reported in Year-Book, 2 Henry IV., folio 8, placitum 40.]

IN an inquest by a chaplain of Grey's Inn for a battery done to him, &c. And the defendants had justified that the wrong which the plaintiff had was from his own assault. *Markham*. Although a man make an assault upon another, if he upon whom the assault is made can escape with his life, it is not lawful for him to beat the other, who made the assault, *quod tota curia concessit*. COCKAYN, C. B. But I am not bound to wait till the other has given a blow, for perhaps it will come too late afterwards, *quod conceditur*.

## ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1455.

[Reported in Year-Book, 33 Henry VI., folio 18, placitum 10.]

IN trespass *quare tales et tantas minas de vita sua et mutilatione membrorum suorum eidem querenti imposuit, &c.* *Hengston*. As to the coming with force, &c., and as to the threats, *son assault demesne*, &c. Ready, &c. PRISOT, C. J. This is no plea to the threats, without more; for if one assaults you to beat you, it is not lawful for you to say that you will kill him, and to threaten his life or limb; but if the case is one where he has you at such an advantage that by intentment he would kill you, as if you should flee from him, and he, being swifter than you, should pursue you so that you could not escape; or, again, if you are under him on the ground; or if he has chased you to a wall, or hedge, or dike, so that you cannot escape him, — then it is lawful for you to say that if he will not depart from you, you, to save your life, will kill him, and so you may threaten him for such special cause, &c., which cause should be a part of your plea. Wherefore, &c. *Hengston*. I will speak with my client with your leave, &c.

motive, seems clear from this note and the principal case. The same is true of the early Teutonic law in general, as is conclusively shown by Professor Heinrich Brunner in his essay "Ueber absichtslose Missethat im altdutschen Strafrechte." — ED.

## ANONYMOUS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1505.

*[Reported in Year-Book, 21 Henry VII., folio 39, placitum 50.]*

NOTE BY FINEUX, C. J. If a man is in his house, and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help him in the defence of his person. \* But if one threatens to beat him if he goes to such a market or such other place, he may not lawfully collect his friends to protect him while going thither, because it is not necessary for him to go, and he may have his remedy by a bond to keep the peace. But one's house is his castle<sup>1</sup> and defence, where he may properly abide. And all the judges agreed that a servant may beat one in defence of his master. TREMAILE, J., said that a servant might kill another to save the life of his master, if the latter could not otherwise escape.

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## STATE v. JOHN P. SHERMAN AND OTHERS.

IN THE SUPREME COURT, RHODE ISLAND, OCTOBER 29, 1889.

*[Reported in 16 Rhode Island, 631.]*EXCEPTIONS to the Court of Common Pleas.<sup>2</sup>

DURFEE, C. J. This is a criminal complaint against John P. Sherman and others for assault and battery on the person of Charles C. Sherman. It comes up here on exceptions from the Court of Common Pleas.

The bill of exceptions shows as follows: The defendant, John P. Sherman, was occupying as tenant a tract of land bordering on a tidal cove connecting with Point Judith Pond, and the complainant, Charles C. Sherman, built a causeway of dirt and stones in the pond across the mouth of the cove, so as to close it, except for the space of about thirty feet at one end, where the water was shallow, thereby obstructing said defendant in the use of the water for ingress and egress to and from his land by boat. On the day of the assault said defendant, wishing to go out with his sail-boat, went upon the causeway to open a passage through the deeper part and began work to that end. The complainant came down soon afterward to stop him, and the affray occurred.

<sup>1</sup> Laurence's Case (1609), 2 Roll. Ab. 548. "One may justify the battery of another who will enter my house, for it is my castle." See to the same effect *Fossbinder v. Svitak*, 16 Neb. 499. — ED.

<sup>2</sup> A portion of the case, relating to procedure, is omitted. — ED.

On trial in the Court of Common Pleas the complainant testified that, seeing the defendants tearing down the causeway, he ran to where said John P. Sherman was at work, and put his foot on a stone which said John P. was prying up with a crowbar; that said John P. raised the crowbar as if to strike him, whereupon he seized it in self-defence, and some one, he knew not who, knocked him down, and that said John P. twice threw him from the causeway into the water. His testimony was corroborated by other witnesses. On the other hand, said John P. testified that the complainant rushed down and seized him, that he never either struck or struck at him, but only pushed him away, using no more force than was necessary for self-protection, as the complainant repeatedly attacked him. Other witnesses corroborated him. He also testified that the open water at the end of the causeway was too shallow for him to pass without getting out of his boat and dragging it. After the case had been argued to the jury, he asked the court to instruct the jury as follows, to wit: "That a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." The court refused, but did instruct them that in such a case a man must retreat, if he can safely, and that the defendant did not testify that there was anything to prevent his retreating. The defendant excepted to both the refusal and the instruction. The bill of exceptions sets forth that the complainant's counsel stated, in his argument to the jury, that he did not claim for the complainant the right to use any force to protect the causeway, or any force against the defendant, except such as he might lawfully use in any public place.

We think the court below erred. Generally a person wrongfully assailed cannot justify the killing of his assailant in mere self-defence, if he can safely avoid it by retreating.<sup>1</sup> Retreat is not always obligatory even to avoid killing; for if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and if need be kill his assailant. But there is no question of killing here, and we know of no case which holds that retreat is obligatory simply to avoid a conflict. Where there is no homicide, the rule generally laid down is, that the assaulted person may defend himself, opposing force to force, using so much force as is necessary for his protection, and can be held to answer only for exceeding such degree. Mr. Bishop, in his work on Criminal Law, § 849, says: "The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow." See, also, 1 Wharton's Criminal Law, § 99; Stephen's Digest Criminal Law, art. 200; May's Criminal Law, Students' Series, § 62. Mr. May's language is: "There seems to be

<sup>1</sup> Shorter v. People, 2 N. Y. 193; State v. Dixon, 75 N. Ca. 275; Commonwealth v. Drum, 58 Pa. 1, 22 Accord. — ED.

no necessity for retreating or endeavoring to escape from the assailant before resorting to any means of self-defence short of those which threaten the assailant's life." In *Commonwealth v. Drum*,<sup>1</sup> where the defendant, who was indicted for murder, set up that he acted in self-defence, the court in charging the jury used the following language: "The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this our liberties would be worthless. But the law does not apply this right to homicide." There are cases, however, which manifest a disposition to apply the same rule generally. *Runyan v. The State*;<sup>2</sup> *Erwin v. State*.<sup>3</sup>

In *Gallagher v. The State*,<sup>4</sup> the defendant was complained of for assault and battery, and set up in justification that he acted in self-defence, the complainant having stepped forward with his cane raised, as if about to strike. The lower court, on trial, ruled as follows: "Where a person is approached by another with a cane raised in a hostile manner, the former is not justified in striking unnecessarily, but is bound to retreat reasonably before striking." On error the Supreme Court held the ruling to be erroneous. "Such is not the law," say the court; "but the party thus assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating at all." The case is exactly in point. The exception is therefore sustained, and the cause will be remitted for a new trial.

*Exceptions sustained.*<sup>5</sup>

## THE STATE v. J. R. BRYSON.

IN THE SUPREME COURT, NORTH CAROLINA, DECEMBER, 1864.

[*Reported in Winston, Law (No. 2), 86.*]

THIS was an indictment for an assault and battery by the defendant on L. S. Gash, tried before Reade, J., at Fall Term, 1864, of Henderson Superior Court.

The defendant's counsel asked the court to charge the jury, that if defendant, at the time he struck Gash, believed that Gash was about to strike him with the knife, that then the defendant had a right to strike him first.<sup>6</sup> The court declined so to charge, but instructed the jury, that if defendant struck Gash, he was guilty, unless he struck in self-

<sup>1</sup> 58 Pa. St. 1, 21, 22.

<sup>2</sup> 57 Ind. 80.

<sup>3</sup> 29 Ohio St. 186.

<sup>4</sup> 3 Minn. 270.

<sup>5</sup> *Heady v. Wood*, 6 Ind. 82; *Gallagher v. State*, 3 Minn. 270; *Commonwealth v. Drum*, 58 Pa. 1, 22; 3 Steph. Dig. Crim. Law (3d ed.), 137, n. 1 *Accord*.

Compare *Howland v. Day*, 56 Vt. 318. — Ed.

<sup>6</sup> Only so much of the case as relates to this request is given. — Ed.

defence: that if the jury believed that the defendant had good reason to believe, and did believe, that Gash was about to strike him, that then the defendant had the right to strike him first, unless the jury believed that the defendant sought the fight, or provoked Gash to attack him; in which case, the defendant would be guilty.

Verdict — guilty, and judgment accordingly from which defendant appealed.

*Attorney General* for the State.

*W. H. Bailey* for the defendant.

MANLY, J. The instructions asked for were properly refused. The court was requested to charge the jury that “if defendant, at the time he struck Gash, believed Gash was about to strike him with the knife, that then the defendant had the right to strike Gash first.”

A right to act in self-defence does not depend upon the special state of mind of the subject of inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defence.

The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what these ought to have been, when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defence, upon an indictment for an assault and battery. Therefore a prayer for instruction, which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused.

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## JAMES RIPPY v. THE STATE.

IN THE SUPREME COURT, TENNESSEE, DECEMBER TERM, 1858.

[*Reported in 2 Head, 217.*]

CARUTHERS, J., delivered the opinion of the court.<sup>1</sup>

James Rippy was indicted in the Circuit Court of Bedford County for the murder of Houston Porter, and convicted of murder in the second degree, and sentenced to twenty-one years' confinement in the penitentiary.

The verdict is well sustained by the testimony. The defence, it seems, was rested upon the existence or apprehension of danger to

<sup>1</sup> Only the opinion of the court is given. — ED.

himself at the time of the homicide. It is now insisted there is error in the charge on that doctrine. The objection is confined to this clause.

“It is argued the deceased made violent threats against the life of defendant long before, and up to a short period of the killing, and that these threats coming to the knowledge of defendant, he had a right to kill the deceased on sight. Such is not the opinion of the court; but to excuse the defendant, and therefore acquit him, the evidence ought to be such as to have reasonably satisfied the defendant that the deceased, at the time of the killing, was doing some overt act, or making some demonstration, showing a present intention to carry such threats into execution, otherwise it would not excuse him.”

The law, as thus laid down by the court, is substantially correct. The doctrine of the Grainger case, as explained by that of Copeland, is undoubtedly the law. Yet no case has been more perverted and misapplied by advocates and juries. We have had one case before us in the last few years, in which the broad proposition stated in the first of the above extract was charged as law. But for this, and the indications that it has obtained to some limited extent in the legal profession, it would scarcely be deemed necessary to notice it. There is no authority for such a position. It would be monstrous. No court should for a moment entertain or countenance it. The criminal code of no country ever has, nor, as we presume, ever will, give place to so bloody a principle.

The law on this subject is, that, to excuse a homicide, the danger of life, or great bodily injury, must either be real or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent* and *imminent*. Previous threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer, but there must be some words or overt acts at the time clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions, or antecedent circumstances, can only be looked to in connection with present demonstrations as grounds of apprehension. To constitute the defence, the *belief* or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defence will not be available. So a case must not only be made out to authorize the fear of death or great harm, but such fear must be really entertained, and the act done under an honest and well-founded belief that it is absolutely necessary to kill at that moment, to save himself from a like injury. It is scarcely necessary to remark that a real or apparent



necessity, brought about by the design, contrivance, or fault of the defendant, is no excuse.

If any less injury than death or great bodily harm is feared or indicated by the circumstances, the plea of *self-defence* will not be sustained, but the degree of the crime may be reduced.

According to these principles, the guilt of the defendant was clearly made out — there was no error in the charge, and the judgment will be affirmed.<sup>1</sup>

### COCKCROFT v. SMITH.

IN THE QUEEN'S BENCH, EASTER TERM, 1705.

[Reported in 2 Salkeld, 642.]

IN trespass for an assault, battery, and maihem, defendant pleaded *son assault demesne*, which was admitted to be a good plea in maihem. But the question was, What assault was sufficient to maintain such a plea in maihem? HOLT, C. J., said that Wadham Wyndham, J., would not allow it if it was an unequal return; but the practice had been otherwise, and was fit to be settled: that for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defence: that if A. strike B., and B. strikes again, and they close immediately, and in the scuffle B. maihems A., that is *son assault*; but if upon a little blow given by A. to B., B. gives him a blow that maihems him, that is not *son assault demesne*. POWELL, J., agreed; for the reason why *son assault* is a good plea in maihem, is because it might be such an assault as endangered the defendant's life.

### ROWE v. HAWKINS.

AT NISI PRIUS, CORAM CROWDER, J., 1858.

[Reported in 1 Foster & Finlason, 91.]

THE defendant was riding his horse in a street in Bristol, when the plaintiff ran from the pavement and seized the bridle. The defendant told him to "loose hold," and, on his not doing so, struck him on the head and face with his riding-whip, bringing blood. The plaintiff still retained his hold.

CROWDER, J. (to the jury). The defendant, after desiring the plaintiff to desist, was justified in endeavoring to obtain his release, using no more violence than was necessary for that purpose; and the

<sup>1</sup> See to the same effect, *Shorter v. People*, 2 N. Y. 193, 197-201. — Ed.

most natural way of doing so was by striking at the person detaining him. That he used no more violence than was necessary for the purpose of extricating himself appears from the fact that, with all that he used, he did not succeed in doing so. *Verdict for the defendant.*

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## OGDEN v. CLAYCOMB.

SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1869.

[Reported in 52 Illinois Reports, 365.]

APPEAL from the Circuit Court of Warren County, the Hon. Arthur A. Smith, judge, presiding.

The opinion states the case.

Messrs. *Stewart* and *Phelps*, for the appellant. Messrs. *Kirkpatrick* and *Glenn*, for the appellee.

Mr. Justice LAWRENCE delivered the opinion of the court.

This was an action for assault and battery, in which the jury found for the defendant. The verdict was against the evidence, and there was error in the instructions for the defendant. From the first instruction the jury would understand, if the plaintiff advanced upon the defendant in a threatening manner for the purpose of fighting, and a fight followed, the plaintiff could not recover, even though the defendant had far exceeded the just bounds of self-defence and inflicted an inhuman beating, provided he desisted as soon as the plaintiff asked him to do so. The rule is, on the contrary, that no more violence can be used than a reasonable man would, under the circumstances, regard necessary to his defence. If he strikes a blow not necessary to his defence, or after all danger is past, or by way of revenge, he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned; and even if he went beyond words, and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defence. All the instructions for the defendant are pervaded to a greater or less degree by these errors, and should have been refused. The judgment must be reversed, and the cause remanded.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> *Hudson v. Crane*, Noy, 115; *Bridgman v. Skinner*, 2 Barnard, 418; *Thomason v. Gray*, 82 Ala. 291; *Boren v. Bartleson*, 39 Ill. 43; *Jones v. Jones*, 71 Ill. 562; *Abt v. Burgheim*, 80 Ill. 92; *Philbrick v. Foster*, 4 Ind. 442; *Rogers v. Waite*, 44 Me. 275; *Hanson v. R. R. Co.*, 62 Me. 84; *Brown v. Gordon*, 1 Gray, 182; *Tyson v. Booth*, 100 Mass. 262; *O'Leary v. Rowan*, 31 Mo. 117; *Scribner v. Beach*, 4 Den. 448; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Edwards v. Leavitt*, 46 Vt. 126; *Smith v. Wilcox*, 47 Vt. 537; *Howland v. Day*, 56 Vt. 318; *Simkins v. Eddie*, 56 Vt. 612; *Hallowell v. Niver* (Court of Session, 1843), 5 D. 759 *Accord.* — Ed.

## DOLE v. ERSKINE.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JULY, 1857.

[Reported in 35 *New Hampshire Reports*, 503.]

TRESPASS, for assault and battery, alleged to have been committed by the defendant upon the plaintiff, at Claremont, in said county, on the 13th of November, 1854. The defendant pleaded that although he did assault the plaintiff, as alleged in the declaration, yet the plaintiff, in defending himself against such assault, used unnecessary and excessive force, then and there beating, bruising, and wounding said defendant in a grievous and shocking manner, wholly unjustifiable by law.

The commissioner to whom the case was referred reported that the averments of the plea were true. The court was to pass upon its validity in law.<sup>1</sup>

EASTMAN, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of *Elliott v. Brown*.<sup>2</sup> In that case it was held that the party first attacked, in a personal rencontre between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defence, as could not be justified under the plea of *son assault demesne*, were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in *Elliott v. Brown* was placed is, that there cannot be a recovery in cross actions for the same affray, but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded.

If an assault is made upon a party, it may be repelled by force sufficient for self-defence, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne*, show the facts and have judgment. To this extent the law is well settled.<sup>3</sup> If the affray stops there, the party first assailed, being justified in what he has done in self-defence, may have his action for the injury that he has received. He

<sup>1</sup> The statement of the case has been abridged, and the arguments of counsel are omitted. — Ed.

<sup>2</sup> 2 Wendell, 499.

<sup>3</sup> 2 Greenl. Ev., sec. 95, and authorities cited.

has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defence, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. *Curtis v. Carson*; <sup>1</sup> *Hannen v. Edes*; <sup>2</sup> *Cockcroft v. Smith*.<sup>3</sup>

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defence he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action: the one that is assailed, for the assault and battery first committed upon him; and the assailant, for the excess of force used upon him beyond what was necessary for self-defence.

We think that these are not matters of set-off; that the one cannot be merged in the other; and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed: the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defence. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In *Elliott v. Brown*, it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished,

<sup>1</sup> 2 N. H. 539.

<sup>2</sup> 15 Mass. 349.

<sup>3</sup> Bul. *Nisi Prius*, 18.

then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received: the assailed party, for the assault first committed upon him; and the assailant for the excess above what was necessary for self-defence.

This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is remarkable that such a plea cannot be found in any of the books, if the defence has ever been regarded by the courts as good law.

Our opinion therefore is, that, upon the facts stated, the plaintiff would be entitled to judgment.<sup>1</sup>

<sup>1</sup> *Thomason v. Gray*, 82 Ala. 291; *Adams v. Waggoner*, 33 Ind. 531, 533 (*semble*); *Stone v. Stone*, 2 Met. (Ky.) 339; *Grotton v. Glidden*, 84 Me. 589, 591; *Darling v. Wilkins*, 35 Oh. St. 58, 63; *Barholt v. Smith*, 45 Oh. St. 177 (*semble*); *Cade v. McFarland*, 48 Vt. 47 *Accord*.

But in *Elliott v. Brown*, 2 Wend. 497; *Chambers v. Porter*, 5 Coldw. 273 (*semble*), it was decided that one who in repelling an attack used excessive force thereby forfeited his right of action against the aggressor. — ED.

## KECK v. HALSTEAD.

IN THE KING'S BENCH, TRINITY TERM, 1699.

[Reported in 3 Lutwyche, 481.]

TRESPASS for killing his mastiff.

The defendant pleads that it was a fierce dog, and did often bite men and cattle, of which the defendant had notice; that the dog came into the defendant's yard against his will; so that he was afraid to go out of his house, of which the plaintiff had notice; and the defendant desired him to keep his dog out of the yard, which he refusing or neglecting, the defendant shot the dog in his own yard, and traversed that he was guilty *extra atrium suum*.

The plaintiff replied *de injuria sua propria*, upon which they were at issue, and a verdict for the defendant; and by the opinion of the whole court the plea was held good.

The Serjeant doth not show that there was any objection made to the plea, why it should not be good, neither doth he give any reason for the judgment, and so there was no occasion of citing any book.<sup>1</sup>

## MORRIS v. NUGENT.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., JULY 27, 1836.

[Reported in 7 Carrington &amp; Payne, 572.]

TRESPASS for shooting the plaintiff's dog. Plea: that the said dog was of a mischievous disposition, and unfit to be at large, whereof the plaintiff had notice; that the dog attacked the defendant, and would have bitten him had he not defended himself, wherefore, in self-defence, and to protect himself from being bitten, he killed him. Replication: *de injuria*. On the part of the defendant evidence was tendered to show that the dog was of a mischievous disposition, and had bitten others.

*J. Evans* objected that such evidence was inadmissible, as being irrelevant to the issue.

LORD DENMAN, C. J. I think it was unnecessary to state in the plea either that the dog was of a mischievous disposition, or that the plaintiff knew it; for the fact of the dog having attacked the defendant would be a sufficient justification for shooting him in self-defence, whether the dog was of a mischievous disposition or not; but you ought to have demurred to the plea for setting out irrelevant facts;

<sup>1</sup> Reynolds v. Phillips, 13 Ill. Ap. 557; Credit v. Brown, 10 Johns. 365 Accord. See Smith v. Griswold, 15 Hun, 273. — ED.

having taken issue upon the plea, I cannot say that the evidence is immaterial.

It appeared that, as the defendant was passing the plaintiff's house, the dog ran out and bit the defendant's gaiter, and that, on the defendant turning round and raising a gun, which he had in his hand, the dog ran away, and that, as he was running away, and before he had got more than five yards off, the defendant shot and killed him.

*J. Evans* contended that the above evidence did not support the plea; that it ought to have been proved that at the time the defendant shot the dog he was in the act of attacking him; whereas here it appeared that he was running away, and he cited *Vere v. Lord Cawdor*, and *Wright v. Ramscott*.

LORD DENMAN, C. J. I think that the plea has not been proved, and the only question therefore for the jury will be one of damages. The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time.

*Verdict for the plaintiff. Damages, 1s.<sup>1</sup>*

— v. FAKENHAM.

IN THE COMMON PLEAS, HILARY TERM, 1470.

[*Reported in Year-Book, 9 Edward IV., folio 48, placitum 4.*]

IN trespass for battery against Fakenham, he says that the plaintiff made an assault upon one W. F., son of the said defendant, and the defendant saw this and commanded one J., his servant, to go to his son and defend him, and keep him from damage, by force of which he went to him and assaulted the said son [plaintiff?], and so the wrong which the plaintiff had was of the assault which he made upon the said W. F., and in defence of him, &c. *Catesby*. This is not to the purpose; for where a man assaults me, if I beat him in my defence, I shall be excused; but if he assaults a stranger, I cannot beat him in his defence, for I have nothing to do with him, but I can part them, &c. *MOYLE*, and *NEEDHAM, JJ.* If I see a man assaulting another, I can part them and put my hand upon him who made the assault, and hold him so that he cannot come at the other, &c.; but they said that I cannot draw my sword and beat the one who made the assault, &c.; but it is otherwise if one assaults my master, I can beat him in defence of my master,<sup>2</sup> &c. *CHOKE, J.* That is true, for the servant is held and bound to

<sup>1</sup> *Uhlein v. Cromack*, 109 Mass. 273; *Perry v. Phipps*, 10 Ired. 259 *Accord*.

But see *Bowers v. Fitzrandolph*, Addis. 215. — ED.

<sup>2</sup> Y. B. 14 Hen. VI., fol. 24, pl. 72; Y. B. 35 Hen. VI., fol. 66, pl. 5; *Barfoot v. Reynolds*, 2 Stra. 593 *Accord*. — ED.

the master, and so he can for his mistress, &c. But the master cannot do as much for his servant, for he is not so held to do for his servant, &c. And then *Genney* says *ut supra* that the plaintiff assaulted the said son of the defendant then being present, &c., and he commanded such an one, his servant, to go to his son and part them, and keep his son without damage, by reason whereof he went to them and parted them, and put his hand upon this plaintiff, so that he should not approach the said son, &c., which is the same battery, &c.

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### SEAMAN v. CUPPLEDICK

IN THE KING'S BENCH, BETWEEN 1607 AND 1612.

[*Reported in Owen, 150.*]

IN a trespass of assault and battery, the defendant justified in defence of his servant, *scil.* that the plaintiff had assaulted his servant, and would have beaten him, &c., and the plaintiff demurred.

**YELVERTON, J.** The bar is good, for the master may defend his servant, or otherwise he may lose his service. 19 Hen. VI. 60 *a.*

**CROOK, J.** The lord may justify in defence of his villein, for he is his inheritance.

*Williams, contra.* The master cannot justify, but the servant may justify in defence of his master, for he owes duty to his master. 9 Edw. IV. 48.

**YELVERTON, J.** The master may maintain a plea personal for his servant, 21 Hen. VII., and shall have an action for beating his servant; and also a man may justify in defence of his cattle.

*Cook.* A man may use force in defence of his goods, if another will take them: and so if a man will strike your cattle, you may justify in defence of them; and so a man may defend his son or servant, but he cannot break the peace for them; but if another does assault the servant, the master may defend him and strike the other if he will not let him alone.

*Williams.* It hath been adjudged in *Banham's* case that a man cannot justify a battery in defence of his soil: *a fortiori*, he cannot in defence of his servant. *Vide* 19 Hen. VI. 31; 9 Edw. IV. 48.



LEWARD *v.* BASELY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1695.

[Reported in 1 Lord Raymond, 62.]

TRESPASS, assault, and battery, for a battery committed upon the wife. The defendant pleads *de son assault demesne* of the wife. The plaintiffs reply, that the defendant went out to fight the husband, and that she, being desirous to assist her husband, and to keep him from being wounded, *insultum fecit* upon the defendant. The defendant demurs. And Mr. Carthew argued that this *insultum fecit* was ill. And for that he cited a case between Jones and Tresilian.<sup>1</sup> Trespass, assault, and battery; the defendant pleaded *de son assault demesne*; the plaintiff replied, that he was possessed of a close called Cupner's close, and that the defendant broke the gate and chased his horses in the close, and the plaintiff for defending his possession *molliter insultum fecit* upon the defendant: and upon demurrer adjudged a bad replication, for he should have said *molliter manus imposuit*; but he could not justify an assault in defence of his possession. And this case the court agreed to be good law, but different from the present case; for this is a justifiable assault, for the wife may lawfully make an assault, to keep her husband from harm, and she has pleaded it so. In the same manner a servant may justify an assault in defence of his master, not *e contra*, because the master might have an action *per quod servitium amisit*. So in this case, if the defendant lifted his hand to strike the husband, the wife might well justify an assault to prevent the blow. And if the fact had been otherwise, the defendant ought to have rejoined *de son tort demesne*, and then it had been against the plaintiff. But a man cannot justify an assault in defence of his horse, or his possession, for there he ought to say *molliter manus imposuit*.

*Judgment for the plaintiff, nisi, &c.*<sup>5</sup>

<sup>1</sup> 1 Lev. 282.

A parent may defend his or her child. *Hill v. Rogers*, 2 Iowa, 67; *Commonwealth v. Malone*, 114 Mass. 295. A child may defend his or her parent. *Greis' Case*, Clayt. 120, pl. 211; *Obier v. Neal*, 1 Houst. 449; *Drinkhorn v. Bubel*, 85 Mich. 532; *State v. Johnson*, 75 N. Ca. 174; *Pinson v. State*, 23 Tex. 579, 583; *Waddell v. State*, 1 Tex. Ap. 720. — Ed.

SECTION VI. (*continued*).

(d) DEFENCE OF PROPERTY.

## ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1440.

[*Reported in Year-Book, 19 Henry VI., folio 31, placitum 59.*]

A WRIT of trespass was brought by A. against another. And counted by *Fortescue* how the defendant with force him assaulted, wounded, and ill-treated. *Markham*. You ought not to have an action, for we say that the plaintiff, in the same place where he supposes the trespass, came and took certain goods of the defendant, viz., &c., and the defendant bade him leave the goods, and the plaintiff would not, whereupon he took them out of his possession, as he lawfully might, and the wrong which he had was in defence of our goods, and we do not at all understand that for this he ought to maintain an action. *Fortescue*. You see well that this plea amounts to nothing more than *son assault demesne*, wherefore we pray to be discharged of the rest. And, sir, as it seems to me, we shall recover our damages by his own confession; for he had a sufficient remedy at common law, *scilicet* he had an action of trespass *de bonis asportatis*, and he would have recovered against the plaintiff for this cause. For, suppose that you make an assault upon me, I am bound to go from you as fast as I can, and not now to beat you. And this is well proved by the plea in bar; for it is that the wrong which he had was from his own assault, and in defence of the defendant; so this case proves well that it is not lawful for any one to beat another; and this case is stronger than the other. Wherefore — PASTON, J. The whole plea *ut supra* shall be entered on the roll; for it does not appear to be a plea of assault merely, as you allege, and it will be mischievous to the defendant to have so general a plea as you would claim, and it will be more reasonable to allege the whole matter *ut supra*, so that the jurors shall have knowledge of the whole matter, than to rule the defendant to so general a plea; for it does not lie in the knowledge of the jurors whether this was merely an assault or not. And suppose that a man was about to carry off your wife, would you not beat him? (*Q. d. sic.*) And notwithstanding that you beat him in defence of your wife, you shall be excused in law; for it is in defence of your chattel; and all this matter shall be entered on the roll *ut supra*, wherefore it seems to me to have been well pleaded. NEWTON, C. J., to the same intent. For, if a man will take my horse from me, or anything which belongs to me, and I will not suffer him to do it, although he is hurt, in this

case I shall be excused in law.<sup>1</sup> And suppose that a man is about to beat my servant, and I aid my servant in his defence, although the other is hurt by me, all this matter shall be adjudged in defence of my servant, and of my goods. For, since he was about to injure me, this malfeasance shall be said to be an assault upon me begun by him, and all this shall be said to be in defence of the goods and chattels of the defendant. Wherefore, &c. And so was the opinion of Ayscoghe, Fulthorpe, JJ., and all the court. *Quod nota.*

## ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1470.

[*Reported in Year-Book, 9 Edward IV., folio 28, placitum 42.*]

IN TRESPASS for a battery the defendant showed how the plaintiff would have taken away 6d. of the moneys of the defendant, and that he put his hands upon him, and would not allow him. And it was held by the Justices that if a man will take my goods, I may lay my hand upon him and prevent him; and if he will not desist, I may beat him, rather than let him carry them off.

## GREEN v. GODDARD.

IN THE QUEEN'S BENCH, BETWEEN 1703 AND 1705.

[*Reported in 2 Salkeld, 641.*]

TRESPASS, assault, and battery, laid on the 1st of October, 3 *Reg.* The defendant, as to the *vi et armis*, pleaded *non cul.* And as to the residue, says, that long before, viz., on the 13th of September, a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, *et manu forti impedivit ipsum ac taurum præd. rescussisse voluit, et quod ad præveniend. etc., ipse idem defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, etc., absque hoc quod cul. fuit ad aliquod tempus ante eundem 13 diem.* The plaintiff demurred. Mr. *Eyre*, for the plaintiff, argued that they should have requested him to go out of the close. 19 Hen. VI. 81; 11 Hen. VI. 23; 2 Ro. Tresp. 547, 548, 549.

<sup>1</sup> Y. B. 19 Hen. VI., fol. 66, pl. 5; *Taylor v. Markham*, Cro. Jac. 224, Yel. 157, Brownl. 215 s. c.; *Alderson v. Waistell*, 1 C. & K. 358; *Motes v. Berry*, 74 Ala. 374; *Commonwealth v. Kennard*, 8 Pick. 133; *Stuyvesant v. Wilcox* (Mich. 1892), 52 N. W. R. 465; *Bliss v. Johnson*, 73 N. Y. 529 *Accord.* — Ed.

*Et per Curiam.* There is a force in law, as in every trespass *quare clausum fregit*: As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close, in law, without a request. The other is an actual force, as in burglary, as breaking open a door or gate; and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence; so, if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request.<sup>1</sup>

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COLLINS v. RENISON.

IN THE KING'S BENCH, TRINITY TERM, 1754.

[Reported in *Sayer*, 138.]

IN the declaration, in an action of trespass, it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground.

The defendant pleaded that he was in possession of a certain garden, and that the plaintiff, against the will of the defendant, erected a ladder in the garden, and went up the ladder, in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff.

Upon a demurrer to this plea, it was holden to be bad,

And by RYDER, C. J. Such force as was used in the present case is not justifiable in defence of the possession of land.<sup>1</sup> The overturning of the ladder could not answer the purpose of removing the plaintiff out of the garden, since it only left him upon the ground at the bottom of the ladder, instead of being upon it.

And by DENISON, J. As only the ladder was in the present case *damage feasant*, it was no more lawful to throw this down whilst the plaintiff was upon it than it is to distrain a horse *damage feasant* whilst a man is upon the horse's back, which it is not lawful to do.

<sup>1</sup> A portion of the case is omitted.—ED.

<sup>2</sup> *Cole v. Maunder*, 2 Rolle Ab. 548; *Simpson v. Morris*, 4 Taunt. 821; *Everton v. Ergati*, 24 Neb. 235; *State v. Lazarus*, 1 Mill, Const. R. 33 *Accord.* — ED.

## TULLAY v. REED.

AT NISI PRIUS, CORAM PARK, J., NOVEMBER 29, 1823.

[Reported in 1 Carrington &amp; Payne, 6.]

THIS was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of *molliter manus imposuit*.

Evidence was given of the assault on the part of the plaintiff, and evidence in support of the special plea was given on the part of the defendant.

PARK, J., laid it down as clear law that if a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary), without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request to depart.

*Verdict for the defendant.*<sup>1</sup>

## COMMONWEALTH v. CLARK.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1840.

[Reported in 2 Metcalf, 23.]

ON the trial of the defendant, in the Court of Common Pleas, before Strong, J., for an assault and battery on Lemuel Briggs, it was proved that the defendant, with another man, entered Briggs's close, and was using his grindstone, when Briggs went to them, and repeatedly ordered the defendant to go from his premises, and the defendant repeatedly told him he would not go, but would remain there as long as he pleased. Immediately after this, according to the testimony of one witness, Briggs "put the flat of his hand on both cheeks of the defendant's face."

<sup>1</sup> Jelly v. Bradley, Car. & M. 270; Thomas v. Marsh, 5 C. & P. 596; Moriarty v. Brooks, 6 C. & P. 684; Polkinhorn v. Wright, 8 Q. B. 197; Holmes v. Bagge, 1 E. & B. 782; Jackson v. Courtenay, 8 E. & B. 8; Lowe v. Telford, 1 App. Cas. 414; Scott v. Brown, 51 L. T. Rep. 746; Thompson v. Berry, 1 Cranch C. C. 45; Riddle v. Brown, 20 Ala. 412; McCarthy v. Fremont, 23 Cal. 196; Peck v. Smith, 41 Conn. 442; McDermott v. Kennedy, 1 Harr. (Del.) 143; Woodman v. Howell, 45 Ill. 367; R. R. Co. v. Peacock, 48 Ill. 253; Smith v. Slocum, 62 Ill. 354; Coleman v. R. R. Co., 106 Mass. 160; Drew v. Comstock, 57 Mich. 176; Breitenbach v. Trowbridge, 64 Mich. 393; Gillespie v. Beecher, 85 Mich. 347; Sanford v. —, 23 N. Y. 343; Wall v. Lee, 34 N. Y. 141; Sage v. Harpending, 49 Barb. 166; Lichtenwellner v. Laubach, 105 Pa. 366; Watrous v. Steel, 4 Vt. 629; Harrison v. Harrison, 43 Vt. 417 Accord.

In Redfield v. Redfield, 75 Iowa, 435, the plaintiff and her husband were living with the defendant in the latter's house by his sufferance. The defendant was held liable for a battery committed in ejecting the plaintiff at an unseasonable hour of the night. — Ed.

Another witness testified that "Briggs brushed the defendant's cheek;" and it was testified by a third witness, that Briggs "struck the defendant on the side of his face twice with the flat of his hand," and that "blood was drawn thereby, probably produced by the nails of the hand."

From the exceptions, upon which the case came into this court, it appeared that "the counsel for the defendant requested the court to instruct the jury that if, in their opinion, this was a battery, it was not a proper kind of force to remove the defendant from Briggs's premises; and that the defendant relied for his defence, that the complainant [Briggs] thereby committed the first assault. The court declined so to instruct the jury, but did instruct them that Briggs had a right, after requesting the defendant to remove from his premises, and his refusal, to use proper and reasonable force to remove him; that the jury must determine, from the testimony, what the transaction was; how much and what kind of force Briggs used; and if, in their opinion, he used more force than was necessary, or if the force was not appropriate and calculated to effect the object of removing him, then they should consider Briggs as having committed the first assault. But if they considered the force, which he used, as necessary and proper, and also appropriate and calculated to effect the object, then he would be justified in what he did, and would not have committed the first assault."

The jury found the defendant guilty, and the defendant alleged exceptions to these instructions of the court.

*Eddy*, for the defendant.<sup>1</sup>

*Austin* (Attorney-General), for the Commonwealth.

SHAW, C. J. It was contended in behalf of the defendant, that the complainant, Briggs, had no right by law to commit a battery on the defendant, in order to remove him from his premises. But the difficulty of maintaining this position in point of law is this: that every touching of another's person, wilfully or in anger, without his consent, is technically a battery, unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault.<sup>2</sup> Whether the act, therefore, in any particular case, is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was a justifiable cause. It would, therefore, be absurd to say it cannot be justifiable because it is a battery. But the true questions, we think, are, 1st, whether the party justifying had a good reason for using force; and if so, 2d, whether such force was appropriate in kind, and suitable in degree, to accomplish the purpose.

It is well settled that a person may, after requesting another to remove from his premises, and his refusal to do so, use force for the purpose of removing him.<sup>3</sup> *Weaver v. Bush*.<sup>4</sup> As the kind and degree

<sup>1</sup> The argument for the defendant is omitted. — ED.

<sup>3</sup> Com. Dig. Pleader, 3 M. 16, 17.

<sup>2</sup> 5 Dane Ab. 534.

<sup>4</sup> 8 T. R. 78.

of force, proper to remove a trespasser, must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case, is a question of fact to be left to the jury. In the present case, there was some contrariety in the statement of the several witnesses, who testified to the transaction. The court were requested to instruct the jury that if the act of Briggs was, in their opinion, a battery, it was not a proper kind of force to be used to remove the defendant from his premises, and so would be the first assault, and justify the defendant. But the court could not properly give this instruction; because, whether it was a battery or not, depended on the question whether it was suitable in kind and degree to accomplish his justifiable object. If it be said that a "battery," in this prayer for an instruction, was not used in its technical sense, but intended striking, or the violent infliction of blows, then the instruction was, in effect, given as prayed for, by the instruction that Briggs could justify no application of force which was not suitable, in kind and degree, to the occasion.

We are of opinion that the instructions were correct and were expressed with accuracy and caution, and with the necessary qualifications, and were conformable to the rules of law.

*Exceptions overruled, and judgment on the verdict.*

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## WADHURST v. DAMME.

IN THE KING'S BENCH, TRINITY TERM, 1604.

[*Reported in Croke's James, 45.*]

TRESPASS, for that at Etonbridge, in the county of Kent, he killed his dog, being a mastiff dog. The defendant pleads that Sir Francis Willoughby was seised in fee of a warren in D., within the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there; and therefore he finding him there *tempore quo*, &c., running at conies, he there killed him, *absque hoc* that he is guilty at Etonbridge *prout*, &c. And it was thereupon demurred.

But all the court held that the matter of justification is good; because it being alleged that the dog used to be there killing conies, it is good cause for the killing him, in salvation of his conies; for, having used to haunt the warren, he cannot otherwise be restrained.

YELVERTON doubted thereof, because it is not alleged that the master was *sciens* of that quality, or had warning given to him thereof.

POPHAM. The common use of England is to kill dogs and cats in all warrens, as well as any vermin; which shows that the law

hath been always taken to be that they may well kill them: so the justification is good. Wherefore it accordingly was adjudged for the defendant.<sup>1</sup>

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JANSON v. BROWN.<sup>3</sup>

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 8, 1807.

[Reported in 1 Campbell, 41.]

TRESPASS for shooting the plaintiff's dog. Pleas: first, not guilty; and, second, a justification that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing. Replication to the last plea: *de injuria sua propria absque tali causa*.

The case being made out on the part of the plaintiff, *Garrow*, for the defendant, said he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But,

LORD ELLENBOROUGH said this would not make out the justification, to which it was necessary that, when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means.

*Verdict for plaintiff, with 1s. damages.*<sup>2</sup>

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## LEONARD v. WILKINS.

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1812.

[Reported in 9 Johnson, 233.]

In error, on *certiorari*, from a justice's court. Leonard sued Wilkins, before the justice, for shooting the dog of the plaintiff. The defendant pleaded not guilty, and the cause was tried before a jury. It was proved that a dog of the pointer breed was possessed by the plaintiff, and that he had no other dog. The defendant said to one of the witnesses that he had shot the plaintiff's dog. Another witness saw the defendant shoot the dog, which was in the field of the defendant. The dog was running with a fowl in his mouth, and the defendant called after the dog before he fired; but he had the fowl in his

<sup>1</sup> See *Lewin's Case*, 2 Rolle, Ab. 567; *King v. Rose*, Freem. 347. — ED.

<sup>2</sup> *Wright v. Ramscot*, 1 Saunders, 84; *Vere v. Cawdor*, 11 East, 568; *Wells v. Head*, 4 C. & P. 568; *Protheroe v. Matthews*, 5 C. & P. 581 *Accord*.

See *Barrington v. Turner*, 3 Lev. 28. — ED.



mouth at the time he was shot. The plaintiff was near the place at the time, on horseback, but it did not appear that the defendant saw him, or knew that he was near, until after he shot the dog. Several witnesses testified that the same dog worried and injured their fowls and geese; and that there was an alarm in the neighborhood respecting mad dogs.

The jury found a verdict that the plaintiff had no cause of action, on which the justice gave judgment against the plaintiff for the costs.

*Per Curiam.* The verdict below was not against law. The dog was on the land of the defendant, in the act of destroying a fowl; and the defendant was justified in killing him, in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined.<sup>1</sup> It was for the jury to determine whether the killing was justified by the necessity of the case, and as requisite to preserve the fowl; and the fowl being on the land of the defendant was enough, without showing property in the fowl.

*Judgment affirmed.*<sup>2</sup>

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## CLARK v. KELIHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1871.

[Reported in 107 Massachusetts Reports, 406.]

TORT, brought originally before a justice of the peace, who gave judgment for the plaintiff. The defendant appealed to the Superior Court, where the facts were agreed as follows:<sup>3</sup>—

“The plaintiff kept a number of hens, and suffered them to go at large. The defendant occupied the adjoining lot. The plaintiff’s hens ran into the defendant’s grass and made nests therein, to some extent. A path was made in the grass. The defendant requested the plaintiff to shut up his hens, and threatened to kill them if they were not. The plaintiff neglected and declined to do so. The hens continued to go upon the defendant’s land, when the defendant openly, with a stick, killed the whole lot of hens, and put them down in the plaintiff’s doorway. The value of hens thus killed was five dollars.”

*C. C. Conant*, for the plaintiff.

*W. S. B. Hopkins*, for the defendant.

AMES, J. The act of killing the plaintiff’s hens was without legal justification. It is admitted that a landowner has no right to kill his

<sup>1</sup> Cro. Jac. 45; 3 Lev. 25.

<sup>2</sup> *Anderson v. Smith*, 7 Ill. Ap. 354; *Dumming v. Bird*, 24 Ill. Ap. 274; *Lipe v. Blackwelder*, 25 Ill. Ap. 119; *Marshall v. Blackshire*, 44 Iowa, 475; *Canifox v. Crenshaw*, 24 Mo. 199; *Brown v. Hoburger*, 52 Barb. 15; *Boucher v. Lutz*, 13 Daly, 28; *Morse v. Nixon*, 8 Jones (N. Ca.), 35, 6 Jones (N. Ca.), 293; *Williams v. Dixon*, 65 N. Ca. 416; *King v. Kline*, 6 Pa. 318 *Accord.* — Ed.

<sup>3</sup> A portion of the case not relating to justification is omitted. — Ed.

neighbor's cattle when found trespassing, but must content himself with his legal remedies of impounding or bringing a suit at law. The destruction of valuable property is not necessary to the protection of his rights: and this rule applies as well to feathered animals not *feræ naturæ*, as to larger and more valuable animals. Animals fully reclaimed and used for burden, husbandry, or food, are property of intrinsic value, and as such are under legal protection. *Blair v. Forehand*.<sup>1</sup> The notice given of his intention to kill them would be a mere threat to do an illegal act, and would not vary the case. It has been decided in Connecticut that the poisoning of a man's hens, after complaint of repeated trespasses, and warning of an intent to kill them, was a wrong for which an action would lie, and we concur with the reasoning of the court in that decision. *Johnson v. Patterson*.<sup>2</sup>

*Judgment for the plaintiff for \$5 and interest.*<sup>3</sup>

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WILLIAM B. LIVERMORE v. DANIEL K. BATCHELDER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, FEB. 25, 1886.

[*Reported in 141 Massachusetts Reports, 179.*]

TORT for killing the plaintiff's dog. Trial in the Superior Court, without a jury, before Brigham, C. J., who found the following facts:

The plaintiff, on February 20, 1884, was the owner of a dog, which was duly licensed by the town of Reading, and wore a collar, duly marked as required by the Pub. Sts. c. 102, § 80.

On said February 20, the plaintiff's dog, with another dog, came upon the defendant's premises, and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises, and were running towards the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

Upon these facts, the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated was not, in law, justifi-

<sup>1</sup> 100 Mass. 136, 140.

<sup>2</sup> 14 Conn. 1.

<sup>3</sup> *Ulery v. Jones*, 81 Ill. 403; *McClelland v. Kay*, 14 B. Mon. 103; *McIntyre v. Plaisted*, 57 N. H. 606; *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Bowers v. Horan* (Mich. 1892), 53 N. W. R. 535; *Arthur v. Wells*, 2 Mill's C. R. (S. Ca.) 314; *Richardson v. Dukes*, 4 McCord, 156; *McCoy v. Phipps*, 4 Rich. (S. Ca.) 463; *Priester v. Angley*, 5 Rich. (S. Ca.) 44; *Hobson v. Perry*, 1 Hill (S. Ca.), 277; *Henderson v. Lyles*, 2 Hill (S. Ca.), 504; *Ford v. Taggart*, 4 Tex. 492; *Champion v. Vincent*, 20 Tex. 811 *Accord.* — Ed.

able; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

*I. W. Richardson*, for the defendant.

*J. G. Holt*, for the plaintiff.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out.<sup>1</sup> *Wright v. Ramscot*;<sup>2</sup> *Janson v. Brown*. See *Commonwealth v. Woodward*.<sup>3</sup>

It is unnecessary to consider whether the common law remedy is taken away by the Pub. Sts. c. 102, §§ 80-110.

*Exceptions overruled.*

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### ALDRICH v. WRIGHT.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, DECEMBER, 1873.

[*Reported in 53 New Hampshire Reports, 398.*]

DEBT, by Arthur R. Aldrich against Wells Wright, to recover the penalties prescribed by sec. 2, chap. 251, General Statutes, for killing minks. The defendant admitted the killing of four minks, but alleged, in justification, that the animals were at the time pursuing his geese.

The only evidence in the case was the testimony of George W. Blood, who, in common with the defendant, owned a small goose-pond. The dividing line between the premises of the witness and the defendant was the brook running into this pond; and the houses occupied by the witness and the defendant were on the opposite sides of the brook, and but a few rods distant therefrom. The witness testified as follows: "I stood in my dooryard; heard the geese cackling; I came out on to a little knoll; I saw the four minks swimming towards the geese; some of the geese had then got on to the shore of the pond and some of them were in the water; the minks were from one to three rods distant from the geese; some of the geese within a rod of the minks, who were one old mink and three young ones, but all about the same size. As soon as the minks saw me they stopped pursuing the geese, and ran out upon a little island, and there stopped. At the same time that I came out the defendant also came out with his gun; he came out

<sup>1</sup> *Brent v. Kimball*, 60 Ill. 211; *Spray v. Ammerman*, 66 Ill. 309; *Hinckley v. Emerson*, 4 Cow. 351 *Accord.* *Baret v. Utley*, 12 Bush, 399 (statutory); *Parrott v. Hartsfield*, 4 Dev. & B. 110 *Contra.* — ED.

<sup>2</sup> 1 Saund. 84.

<sup>3</sup> 102 Mass. 155, 161.

near the end of a causeway that is laid across the lower end of the pond, and fired at the minks on the island, killing them all at one shot; the minks were all on the island when he fired; the defendant carried the minks off to his house; the geese were six old ones, and eight young ones about half grown; geese had run in the pond two or three summers; never knew of any mink chasing any geese there before or since; don't know whether minks are accustomed to kill geese or not."

A verdict was taken for the plaintiff by consent, subject to the defendant's exception to a *pro forma* ruling that the defendant would not be justified in killing the minks if the geese were not in imminent danger, and could have been protected either by driving away the geese, or frightening or driving off the minks.

*Ray, Drew and Heywood*, for the defendant.

*G. A. Bingham and Aldrich*, for the plaintiff.

DOE, J. In this case the question is, not of the real danger merely, but also of the danger, on reasonable grounds, really believed by the defendant to exist.

The reputation of the minks, their pursuit of the geese, and the alarm and retreat of the latter, may have shown apparent danger, when the real character of the pursuers may have created no actual danger. Mr. Blood, a near neighbor of the defendant, did not know whether minks are accustomed to kill geese or not. The defendant may have been equally uninstructed. And it was not his duty to postpone the defence of his property until, neglecting his usual occupations and incurring expense, he could examine zoölogical authorities, consult experts, or take the opinion of the county, on the question whether his "half-grown" geese were actually endangered, in life or limb, by the incursion of "one old mink and three young ones," "all about the same size." The conclusion of the investigation might be too late. And if the question were found to be a debatable and doubtful one, it would not be his duty to settle it by a trial at his own risk. The plaintiff's doctrine destroys the right of defence which exists in a case of merely apparent danger.

The plaintiff's claim that the defendant is liable if the geese were not in imminent danger, taken in the sense for which the plaintiff contends, and the sense in which both parties, at the trial, probably understood it, cannot be sustained.

The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement; and, in its broad and popular signification, admitting a large degree of latitude and adaptation to circumstances, it may be properly used in this case. But it has been so much used in cases of defence against a human aggressor, and, in that class of cases, has, for peculiar reasons, acquired a legal meaning so special, restricted, and technical, that, if used in a case like the present, it should be accompanied by some explanation of the general comparative and relative sense in which it is used.

It is probable that the parties understood that, by the doctrine of imminent danger, the defendant was liable unless the geese would, in a few moments, have been killed by the minks but for the defendant's shot. The doctrine, asserted in that form, would be erroneous. It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defence, — considering all the material elements of the question, it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese, continuing to resort as usual to the pond, apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property.

Neither was there a remedy in guarding the fowls day and night. The profit accruing from six old geese and eight young ones would not pay the expense of constant convoy. His property might as well be consumed by the minks as by the cost of a guard. But, however small the value of the property, he had a right to protect it by means reasonably necessary: reasonable necessity included a consideration of economy: and eternal vigilance, as the price of success in his limited anserine business, was not reasonable. According to the precedent of charging the watch to bid any one stand, and, if he will not stand, to let him go, the defendant should have been thankful if the minks, when challenged, had gone off; but their halt at the island showed no inclination to go any considerable distance. What practicable method was there of protecting the geese in the peaceful possession and enjoyment of the pond? Without a resort to firearms, his situation would seem to have been full of embarrassment. The invasion of his premises was annoying; the legal perplexities, with which it is now claimed he was environed, had they been understood by him at the time, would have been distressing.

If (as a jury would probably find the fact to be) it apparently was reasonably necessary for him to kill the minks in order to prevent their doing mischief to his property, the authorities do not show that he transcended the right of defence.

The claim that the defendant was liable if the geese could have been protected by driving them away from the minks, cannot be sustained.

Requiring the defendant to drive away the minks if he could, is an admission that he had a right to drive them away, and that they had no right to remain on his premises without his consent. But requiring him, if he could not drive them away from the geese, to drive the geese away from them, is a practical denial of his right to keep geese

in his own pond or on his own land, if he could only keep them there by killing minks. It amounts to this: it being impracticable to permanently eject the assailants, he must banish the assailed; and, the raising of geese being impossible, the raising of minks is compulsory. A freeholder, permitted to fire blank cartridges only to cover the endless retreat of his poultry before these marauders, and obliged to suffer such an enemy to ravage his lands and waters with boldness generated by impunity, is a result of turning the fact of the reasonable necessity of retreating to the wall before a human assailant into a universal rule of law. This rule practically compels the defendant to bring his poultry to the block prematurely, and to abandon an important branch of agricultural industry. His right of protecting his fowls is merely his right of exterminating them.

To hold, in this case, that the geese should have been driven away from their home, would be equivalent to holding that they should have been killed. The doctrine of retreat would leave them a right to nothing but life in some place inaccessible to minks, where life might be unremunerative and burdensome. But that doctrine being irrelevant when the aggressor is not shielded by the inviolability of the human form and the sacred quality of human life, the geese were not bound to retreat. As against the minks, they had a right, not only to live, but to live where the defendant chose, on his soil and pond, and to enjoy such food, drink, and sanitary privileges as they found there, unmolested by these vermin, in a state of tranquillity conducive to their profitable nurture. And it was for the jury to say, not whether he could have driven them away from the minks, but whether his shot was reasonably necessary for the protection of his property, considering what adequate and economical means of permanent protection were available, the legal valuation of vermin life, and the disturbance and mischief likely to be wrought upon his real and personal estate if any other than a sanguinary defence were adopted.

*Verdict set aside.*<sup>1</sup>

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ELISHA W. DAVIS v. CHARLES CAMPBELL.

IN THE SUPREME COURT, VERMONT, JANUARY TERM, 1851.

[Reported in 28 Vermont Reports, 236.]

TRESPASS for injury to the plaintiff's cow by means of a dog.

The referee reported substantially as follows: The plaintiff, at the time of the injury complained of, was the owner of a cow, which, with other cattle of the plaintiff, ran at large in the highway, and entered from the highway into the defendant's inclosure, adjoining the highway, and were there doing damage; and the defendant caused the cow to be driven from thence by means of a dog. The cow was pur-

<sup>1</sup> See Taylor v. Newman, 4 B. & S. 89, 91. — Ed.

sued by the dog eight or ten rods into the highway, and was greatly injured by being bitten by the dog. The dog was of a medium size, and was not of ferocious disposition, and was such a dog as a prudent farmer might and would use in driving his own cattle from his inclosure; and the defendant and his servants, in driving the plaintiff's cow from the inclosure by means of the dog, used such care and prudence as any man of ordinary care and prudence would use in the management of his own property under like circumstances. It did not distinctly appear whether the fence which separated the defendant's inclosure from the highway was or was not sufficient and legal fence. The referee assessed the damage\* sustained by the plaintiff at twelve dollars, and submitted to the court to decide whether, upon the facts reported, he was entitled to recover that sum, or nominal damages, or whether the defendant was entitled to judgment for his costs. The County Court, April Term, 1850 — Royce, C. J., presiding — rendered judgment, upon the report, for the defendant. Exceptions by plaintiff.

*A. O. Aldis*, for plaintiff.

*H. E. Royce*, for defendant.<sup>1</sup>

The opinion of the court was delivered by

REDFIELD, J. In regard to the merits of the case, we suppose the case of *Clark v. Adams*<sup>2</sup> must be esteemed pretty much decisive upon all the points raised. The land there was not inclosed by a legal fence, so that the party could have obtained redress by impounding the cattle; and it was considered no obstacle to his driving the cattle off his inclosures by means of a dog, more than medium size, provided he did it in a prudent and careful manner, — all which is expressly found by the referee in the present case. Indeed, that case seems to us, in its facts and circumstances, even stronger than the present; and we must understand that if the defendant was guilty of no want of ordinary care in setting the dog upon the cow and in driving her out of the field, which is expressly stated by the referee, he did call the dog off as soon as possible, for that seems necessarily implied in the former finding. Any other construction would be a refinement upon the words used by the referee.

We do not suppose that it was indispensable to the defendant's right to impound creatures doing damage in his fields, that the fence adjoining the highway should have been legally sufficient, such fence being expressly excepted in the Revised Statutes, chap. 88, § 16. The law was otherwise under the former statute as to neat cattle, but must, I think, be considered as modified by that statute.

*Judgment affirmed.*<sup>3</sup>

<sup>1</sup> The arguments of counsel, and a part of the case not relating to the justification, are omitted. — Ed.

<sup>2</sup> 18 Vt. 425.

<sup>3</sup> *Richardson v. Carr*, 1 Harringt. 142; *Grier v. Ward*, 23 Ga. 145; *Amick v. O'Hara*, 6 Blackf. 258; *Knott v. Digges*, 6 Har. & J. 230; *Wood v. LeRue*, 9 Mich. 158; *Totten v. Cole*, 33 Mo. 138; *Cory v. Little*, 6 N. H. 213; *Humphrey v. Douglass*, 11 Vt. 22; *Clark v. Adams*, 18 Vt. 425.

## REA v. SHEWARD.

IN THE EXCHEQUER, EASTER TERM, 1837.

[Reported in 2 Meeson &amp; Welsby, 424.]

TRESPASS for breaking and entering a building and close of the plaintiff, and removing certain goods from the building, and depositing them upon the close. Pleas: fifthly, that R. C. was seised in fee of the building, and being so seised, demised it to the defendants, who thereupon entered, &c.; and because the said goods in the declaration mentioned were encumbering the said building, the defendants removed them to a small and convenient distance, to wit, into the said close of the plaintiff adjoining thereto, and there left them for the use of the plaintiff, the said close of the plaintiff being a convenient place for depositing the same, &c. The plaintiff replied that R. C. was not seised in fee, on which also issue was joined. At the trial before Parke, B., at the last Worcester assizes, the jury found a verdict for the defendant. In the present term

Godson, moved to enter up judgment for the plaintiff *non obstante veredicto*.<sup>1</sup> *Cur. adv. vult.*

On a subsequent day PARKE, B., delivered judgment. This was a case which stood over for our judgment on a motion made to enter up judgment *non obstante veredicto*. It was contended by Mr. Godson that the law did not allow a person to enter into a plaintiff's close, even for the purpose of depositing there the plaintiff's own goods which he had wrongfully placed on the premises of the defendant. When the case was moved, it occurred to me that there was an authority in Viner's Abridgment which would dispose of it. I have since found it; it is in title Trespass, 516, pl. 17 (I, a), and also in Roll. Abr. Trespass, I, pl. 17 (p. 566), where it is said that, "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff (as it was pleaded), inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff. P. 11 Car. B. R., between Cole and Maundy, adjudged upon a demurrer."<sup>2</sup> So, also, if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them *damage feasant*. Tyrringham's Case.<sup>3</sup> There must, therefore, be no rule. *Rule refused.*<sup>4</sup>

<sup>1</sup> The argument for the plaintiff is omitted. — ED.

<sup>2</sup> 2 Roll. Ab. 566 s. c. — ED.

<sup>3</sup> 4 Rep. 38 b.

<sup>4</sup> Neaves v. Barrett, 6 Vict. R. (4) 165 Accord. — ED.



## GILMAN v. EMERY.

SUPREME JUDICIAL COURT, MAINE, 1867.

[Reported in 54 Maine Reports, 460.]

ON EXCEPTIONS. Trespass to recover damages to plaintiff's horse and wagon.

It appeared that the plaintiff started with his brother to drive two heifers, from his stable, in Waterville, to another town. As they were passing defendant's premises, leading plaintiff's horse attached to his wagon, and driving the heifers, one of the latter turned and ran back. Whereupon the plaintiff hitched his horse to a shade-tree, twenty-two inches in diameter, standing upon the defendant's premises, but within the limits of the highway, and went back for his heifer. The defendant, seeing plaintiff's horse so hitched, removed him and hitched him to a post a few feet from the tree. When the plaintiff was returning for his horse, some twenty minutes afterwards, he saw his horse running through the streets, with halter dragging, and the wagon broken. There was no evidence as to the precise manner in which the defendant hitched the horse, or as to how he was freed from the post.

*E. F. Webb*, for the plaintiff.

*Reuben Foster*, for the defendant.

WALTON, J. Travellers have no right to hitch horses to shade-trees. It is well known that most horses have a propensity to gnaw whatever they are hitched to. Hitching-posts of the hardest wood have to be capped with iron, or they are soon so badly gnawed as to be ruined. Too many beautiful shade-trees, planted at great expense and watched for many years with anxious care, have been destroyed by having horses hitched to them, not to know that the practice is exceedingly dangerous. When, therefore, the owner of a shade-tree finds a horse hitched to it, he may immediately remove him to a place of safety, and such removal will not be a trespass.

In this case the defendant found a horse hitched to one of his shade-trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges him with trespass *vi et armis*, in taking and carrying away the horse, buggy, &c.

The presiding judge being of opinion that the action could not be maintained, ordered a nonsuit, to which the plaintiff excepted. We cannot doubt that the nonsuit was rightly ordered.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> See *Young v. Vaughan*, 1 Houst. 331. — ED.

## ROBSON v. JONES.

COURT OF APPEALS, SOUTH CAROLINA, DECEMBER, 1830.

[Reported in 2 Bailey, 4.]

TRESPASS for breaking plaintiff's close, and carrying off his goods. The plaintiff, a merchant, contracted to purchase a wagon-load of cotton from the defendant at a stipulated price, and the cotton was turned out and weighed. It was then discovered that the cotton was fraudulently packed, and the plaintiff refused to take it at the price stipulated, but insisted upon a right to retain it, paying for it what, upon a survey by merchants, should be thought its value. To this the defendant objected; but the cotton was allowed to remain in plaintiff's yard until the next morning, when the defendant replaced it in his wagon. To prevent its removal, plaintiff locked his gate, which defendant broke, and forced his way out.

His Honor charged that, the cotton being fraudulently packed, the plaintiff had a right to refuse paying the price stipulated, but his doing so put an end to the contract of sale, and the defendant's title continued unimpaired. He had no right to insist upon a sale at a reduced price, which was a new contract, into which the defendant was not bound to enter; that as to breaking plaintiff's close, defendant had entered by plaintiff's consent, and he and his goods were detained there against his will; and under such circumstances he had a right to force his way out, and committed no trespass in doing so.

Verdict for defendant. Motion for new trial, on the ground of misdirection as to law and fact.

*Hammond*, for motion; *W. F. Desaussure*, contra.

JOHNSON, J., delivered the opinion of the court. The court is of opinion that the jury were correctly instructed as to the law of the case, and their finding as to the facts is conclusive.

*Motion refused.*

## BURGESS v. GRAFFAM AND OTHERS.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS,  
OCTOBER 31, 1883.

[Reported in 18 Federal Reporter, 251.]

At law.

*Warren and Brandeis*, for plaintiff.

*Gray, Cogswell & Appleton* and *W. L. Graffam*, for defendants.

LOWELL, J. In June, 1880, the defendant Graffam, having, as a judgment creditor, sold the land and house of the plaintiff for a small

debt, and having permitted the year of redemption to expire without actual notice to her, entered upon the house, which was vacant, and caused the plaintiff's furniture to be removed by the defendants Freeman, Elliot, and Hallahan, to the store-house of the defendant Eastman. In a suit in equity I held that no remedy could be had against these defendants and others for a conspiracy, because the conduct of Graffam, though harsh and immoral, was not illegal; but that the plaintiff might redeem her house from Graffam; and I intimated that if there were any remedy against the defendants for removing the furniture, it must be sought in an action of trespass or trover. *Burgess v. Graffam*.<sup>1</sup>

This action contains counts in trespass and in trover, for removing and storing the plaintiff's furniture without notice to her.

The answer of each defendant contains a general denial, which is not objected to. In addition, the answer of Graffam alleges that he had both the right of property and the right of possession in the house; that he entered according to his right, and caused the furniture to be removed in a suitable and proper manner; and that the goods of the plaintiff were removed to a suitable and proper place, subject to the order of the plaintiff, of all which she was [afterwards] notified. The defendants Freeman, Elliot, and Hallahan answer that they were employed by Graffam to remove the furniture, which they did in a prudent and proper manner, and stored it in a suitable and proper place with the defendant Eastman. Eastman answers that he stored the goods in a suitable and proper manner, at the request of Graffam, and has always been ready to deliver them to the plaintiff.

To so much of the answers as contains the confession and avoidance, the plaintiff demurs.

The pleadings, and the case of *Burgess v. Graffam*, *supra*, to which both parties have referred in argument, show that these facts must be taken as true for the purposes of this demurrer: Graffam had the legal right to enter and possess the house; he made his entry without notice to the plaintiff, and gave her no notice of his intention to remove her furniture; but he did remove and store it in a safe place, without actual damage to the goods themselves; and then notified the plaintiff of what he had done.

The circumstances are unusual, and no cases very much in point have been cited in the able brief of the plaintiff. His analogy of the entry of a landlord upon a tenant at sufferance, is, however, pretty close; and in that case the tenant must be allowed a reasonable time to remove his goods.<sup>2</sup> I am of opinion that the counts in trover can-

<sup>1</sup> 10 Fed. Rep. 216.

<sup>2</sup> But if the tenant does not take away his goods in a reasonable time the landlord may remove them from his premises. *Stearns v. Sampson*, 59 Me. 568; *Manning v. Brown*, 47 Md. 506; *Clark v. Keliher*, 107 Mass. 406; *Overdew v. Semi*, 1 W. & S. 90; *Freeman v. Wilson*, 16 R. I. 524. —ED.

not be sustained, because there has been no conversion. *Spooner v. Manchester*,<sup>1</sup> and cases cited in the opinion.

Trespass, on the other hand, will lie for nominal damages, at least. When the defendant Graffam, in the exercise of a legal right, made an entry, of which he knew that the plaintiff would not have actual notice, upon the vacant house which had lately been hers, it was, in my opinion, his duty to notify the plaintiff before he removed and stored her furniture. She had the right to say where it should be put, and with whom. The title to the house having been changed without her actual knowledge, she did not become a trespasser by leaving her furniture in the house until she had received such notice. Supposing that she is bound to some sort of constructive notice of the change of title by the sale upon the execution, and the expiration of the year of redemption, yet she was not bound by any such constructive notice to know when, if ever, the plaintiff would take possession of his newly acquired premises. He might have brought a writ of entry against her for the possession; or have taken it in some mode which would have informed her of his intention to take it. Graffam, therefore, had no right to put her furniture into the street, and no more right to store it with Eastman, though the damages for the one act may be very different from those which might have followed the other.

The answer is adjudged good to the counts in trover, but not to those in trespass.

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WILLIAMS v. LADNER.

IN THE KING'S BENCH, NOVEMBER 24, 1798.

[*Reported in 8 Term Reports, 72.*]

TRESPASS. The case on the pleadings was shortly this: The plaintiffs, the tithe-owners, complained that the defendant's cattle have destroyed their tithes. The defendant, the landowner, says that the tithes were duly set out on his land, of which the plaintiffs had notice; that a reasonable time for removing them passed, and then the defendant put his cattle into his land to depasture it, and the cattle ate the tithes.<sup>2</sup>

*Praed*, for the defendant.

*Gaselee*, for the plaintiff.

LORD KENYON, C. J. This is a question of universal concern; but as the point appears to have been solemnly decided in this Court of Common Pleas near a century ago, and that judgment was founded on

<sup>1</sup> 133 Mass. 270.

<sup>2</sup> This short statement, taken from the argument of *Praed*, is given instead of the pleas *in extenso*; the argument of *Praed* is also omitted. — Ed.

a prior case in the 22 Car. II., in the court, I think it ought not now to be disturbed. That decision is also supported by reason; it is much better that the owner of the land should appeal to the laws of his country for redress than that he should take the law into his own hands. If the defendant were to succeed in this case, it would establish this proposition, that if cattle stray on the property of any person he may destroy them; but he is bound to drive them out in a reasonable manner. Here the defendant might either have brought an action against the plaintiffs for not taking away the tithes, or he might have distrained the tithes *damage feasant*. Without, however, inquiring into the reasons on which the case in 1 Ld. Raymond, 187, proceeded, it is sufficient for us to say that that case was fully considered, and that it was there decided that the owner of the land cannot turn out his cattle before the tithes are removed, but must resort to his action; and every case that inculcates the principle, that a party should apply to the law rather than take the law into his own hands, ought to be adopted in courts of justice.

LAWRENCE, J. I think there is a great deal of reason in the argument urged on behalf of the defendant in this case; but it would be too much for us to overset that case in Ld. Raymond, in which this point was decided. *Per curiam. Judgment for the plaintiffs.*<sup>1</sup>

<sup>1</sup> Webb v. Paternaster, Godb. 282, Poph. 151, Palm. 71, Noy, 98, 2 Rolle R. 143, 152 s. c.

“And it was adjudged *per curiam* in this principal case that the plaintiff could not put in his cattle and eat the corn; for if that should be allowed, it would subvert the foundation of this action for the other part, which hath often been adjudged maintainable. Besides that, it is unreasonable that the plaintiff himself should be judge what is convenient time. And to permit him, if the corn is not removed at the day, to put in his cattle and eat all the corn, would be a much greater loss to the parson than that which the plaintiff hath sustained by the continuance of the corn upon the land. But it is much more reasonable to permit the plaintiff to bring an action against the parson, and so the court to be judge of the reasonableness of the time, and that the recompense be proportionable to the loss sustained. And therefore judgment was given for the plaintiff.” — Shapcott v. Mngford, 1 Ld. Raym. 789. See Craven v. Hanley, Comyn, 548; Odgen v. Lucas, 48 Ill. 492. — Ed.

SECTION VI. (*continued.*)

## (e) RECOVERY OF PROPERTY.

## ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1506.

*[Reported in Keilwey, folio 92, placitum 4.]*

TRESPASS for assault and battery and beasts taken. The defendant says as to all but the assault, not guilty; and as to the assault, that, before the trespass, he was possessed of a horse as of his own proper goods, and was possessed of it till the plaintiff took it out of his possession; and the defendant, the said day and year, requested it of the plaintiff, and the plaintiff said that he would not deliver it to him; and the defendant said that if he did not return it he would take it from him in spite of him; and then he took a staff that was lying on the ground, and came towards the plaintiff with the staff, which is the same assault for which the plaintiff has conceived his action. And the opinion of FINEUX and his companions was that this was an assault justifiable.

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## BLADES v. HIGGS.

IN THE COMMON PLEAS, JUNE 8, 1861.

*[Reported in 30 Law Journal Reports, Common Pleas, 347.]*

TRESPASS. Declaration, that the defendants assaulted and beat, and pushed about the plaintiff, and took from the plaintiff the plaintiff's goods; that is to say, dead rabbits.

Third plea, as to the assaulting, beating, and pushing the plaintiff, that the plaintiff at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said marquis, and the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use, whereupon the defendants, as the servants of the said marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and thereupon the defendants, as the servants of the said marquis and by his command, gently laid their hands upon the plaintiff, and took the

said rabbits from him, using no more force than necessary, which are the alleged trespasses.

Demurrer and joinder.

*Beasley* (June 3), in support of the demurrer.

*Field*, in support of the plea.<sup>1</sup>

The judgment of the court<sup>2</sup> was now, June 8, delivered by

ERLE, C. J. In this case the declaration was for assault and battery, and the substance of the justification was, that the plaintiff having wrongfully in his possession rabbits belonging to the defendant (we consider the servants here the same as the master), and being about to carry them away, the defendant requested him to refrain, and on his refusal *molliter manus imposuit*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff demurred, and thereby admits that he was doing the wrong, and that the defendant was maintaining the right, as alleged; and he contends that the defendant is not justified in using necessary force on account of the danger to the public, but adduces no authority to support his contention. The defendant also has adduced no case where this justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made. If the defendant had actual possession of the chattel, and the plaintiff took it from him against his will, it is not disputed that the defendant might justify using the force sufficient to defend his right and retake the chattel; and we think that there is no substantial distinction between that case and the present; for if the defendant was the owner of the chattel, and entitled to the possession of it, and the plaintiff wrongfully detained it from him after request, the defendant in law would have the possession, and the plaintiff's wrongful detention against the request of the defendant would be no possession, but would be the same violation of the right of property as the taking of the chattel out of the actual possession of the owner. It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land as well as chattels the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified. See *Newton v. Harland*. But in respect of land, that argument has been overruled in *Harvey v. Brydges*.<sup>3</sup> There, Parke, B., says, "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public for a forcible entry, he

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> Erle, C. J., Willes, J., and Byles, J.

<sup>3</sup> 14 M. & W. 437.

is not liable to the other party; and I cannot see," he says, "how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed."

In our opinion all that is so said of the right of property in land applies in principle to the right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it; and on these grounds our judgment is for the defendants.

*Judgment for the defendants.*<sup>1</sup>

## BOBB v. BOSWORTH.

IN THE COURT OF APPEALS, KENTUCKY, NOVEMBER 24, 1808.

[*Reported in 2 Littell, Selected Cases, 81.*]

THIS was an action of assault and battery, brought by Bosworth against Bobb, in which "not guilty" was pleaded, with leave to give special matter in evidence. A verdict having been found for the plaintiff, a new trial was moved for by the defendant, which was overruled. Whereupon he filed a bill of exceptions, containing the whole evidence given on both sides, and appealed to this court, in which he hath assigned for error, that a new trial ought to have been granted.

This will depend upon the question, in what cases, and in what manner can the right of recaption be lawfully exercised? There is

<sup>1</sup> In the following cases a battery committed by the defendant in the recaption of his personal property from the plaintiff was adjudged excusable:—

Rex v. Milton, M. & M. 107. (B. gave A. a paper to read, and return on the spot. A. was about to carry it off.)

Baldwin v. Hayden, 6 Conn. 453 (similar to Rex v. Milton).

Commonwealth v. Donahue, 148 Mass. 529 (similar to Rex v. Milton, *supra*).

State v. Elliot, 11 N. H. 540. (Wrongful taking by A. from B.'s premises. Fresh pursuit, and recaption about one hundred rods from the place of taking.)

Stirling v. Warden, 51 N. H. 217. (Very special in its circumstances. A new postmaster commits battery in taking possession of the property of the United States.)

Hopkins v. Dickson, 59 N. H. 235. (Wrongful taking by A. How fresh the pursuit was, does not appear.)

Gyre v. Culver, 47 Barb. 592. (A. was stealing wood on B.'s land.)

Anderson v. State, 6 Baxt. 608. (A. got money from B. by fraud. B., discovering the fraud, immediately took the money from A.)

Hodgden v. Hubbard, 18 Vt. 504. (A. fraudulently bought a stove. B. on the same day pursued A., and overtook him two miles from place of purchase.)

Johnson v. Perry, 56 Vt. 703. (A., on B.'s land, was wrongfully putting slabs on his sled. B. took the slabs off the sled.) — Ed.



no doubt, but that one having either the general or a special right of property in personal chattels, may, if wrongfully dispossessed thereof, retake them wherever he can find them, provided he can obtain peaceable possession; but the law more highly regards the public peace, than the right of property of a private individual, and therefore forbids recaption to be made in a riotous or forcible manner. The law, however, permits the possessor of property to maintain his possession by force, where force is used in attempting to divest his possession; the law, in that case, permits the party in possession to oppose violence to violence. It is material, whether the violence has been used to regain a possession which had been previously lost, or whether it has been used to maintain a present possession. In the former, it is unlawful; in the latter, lawful.

In the case now before the court, it appears that Bosworth, at the time the assault and battery was committed, was in possession of the slave, which was the subject of dispute between the parties; that Bobb came, with others, to retake him out of Bosworth's possession in a violent and forcible manner, which was resisted by Bosworth; and, in the scuffle, Bobb broke the arm of Bosworth. It is not material, whether Bobb or Bosworth had the better right to the negro. Bosworth was in actual possession; Bobb could not lawfully use violence and force in regaining possession. Having broken the peace, and used force, where he was forbidden by law to do so, he must be answerable for the consequences.

*Judgment affirmed, with damages and costs.*<sup>1</sup>

<sup>1</sup> In the following cases a battery committed upon a wrongful possessor in the recaption of personal property by its owner was held to be unjustifiable:—

*Street v. Sinclair*, 71 Ala. 110 (*semble*. Mortgagee entitled to possession may not commit battery in getting possession. Approved in *Burns v. Campbell*, 71 Ala. 271, 287, and *Story v. State*, 71 Ala. 323, 338).

*Andre v. Johnson*, 6 Blackf. 375. (How the possessor obtained the property, and how long he had held it, the report does not disclose.)

*Stuyvesant v. Wilcox*, 92 Mich. 233 (*semble*).

*Davis v. Whitridge*, 2 Strob. 232. (Plaintiff in possession under a bailment at will.)

*Harris v. Marco*, 16 S. Ca. 575. (Plaintiff, in view of the defendant, seized and was about to lead away the latter's horse left by him temporarily in a public square.)

*Bowman v. Brown*, 55 Vt. 184. (Plaintiff acquired possession rightfully.)

*Barnes v. Martin*, 15 Wis. 240. (Plaintiff was in peaceable, though wrongful, possession. Mode of acquiring possession and its duration not made clear.)—ED.

## KIRBY v. FOSTER AND ANOTHER.

IN THE SUPREME COURT, RHODE ISLAND, JULY 25, 1891.

[Reported in 22 *Atlantic Reporter*, 1111.]

STINESS, J.<sup>1</sup> The plaintiff was in the employ of the Providence Warehouse Company, of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of \$50, belonging to the corporation, had been lost; for which the plaintiff, a book-keeper, was held responsible, and the amount was deducted from his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff, and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition for a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz., whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. As the defendants only pleaded the general issue, all requests relating to justification might properly have been refused on that ground.<sup>2</sup> The case, however, having been tried upon the defence of justification, we will consider the exceptions as though that defence had been pleaded. The defendants contend that the relation of master and servant subsisted between the plaintiff and Samuel J. Foster, the manager of the warehouse, whereby possession of money by the plaintiff was constructively possession by the manager, acting in behalf of the company; and that, the money having been delivered to the plaintiff for the specific purpose of paying the help, his conversion of it to his own use was a wrongful conversion, amounting to embezzlement, which justified the defendants in using force in defence of the property under their charge. Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defence

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 1 Chit. Pl. 501; 2 Greenl. Ev. § 92.

and recapture involves two things: *First*, possession by the owner; and, *second*, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is a frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation, the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed. He started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence, as stated in *Cluff v. Insurance Co.*,<sup>1</sup> cited by the defendants, even a forcible taking of property, "if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because, where a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes."

In the most favorable view of the case for the defendants, the plaintiff, having obtained the money by no crime, misrepresentation, or

<sup>1</sup> 13 Allen, 308.

violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*,<sup>1</sup> "The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld." See, also, *Harris v. Marco*,<sup>2</sup> *Barnes v. Martin*,<sup>3</sup> *Andre v. Johnson*.<sup>4</sup> In *Commonwealth v. McCue*,<sup>5</sup> it was held that an owner of cattle, which had been taken up by one who claimed to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer *de facto*, and demanded illegal fees. But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy.

The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar: *Blades v. Higgs*. This was on demurrer to a plea which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*,<sup>6</sup> and *Gyre v. Culver*,<sup>7</sup> there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgeden v. Hubbard*,<sup>8</sup> the plaintiff obtained the property by false representations. *Baldwin v. Hayden*,<sup>9</sup> apparently sustains the defendant's contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliot*,<sup>10</sup> is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is far more limited than that of its defence, and recognizes the question whether the person removing it is a mere wrong-doer as one of the questions to be determined.

The defendants object to the charge of the court that, where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction

<sup>1</sup> 73 N. Y. 529.<sup>2</sup> 16 S. Ca. 575.<sup>3</sup> 15 Wis. 240.<sup>4</sup> 6 Blackf. 375.<sup>5</sup> 16 Gray, 226.<sup>6</sup> 56 Vt. 703.<sup>7</sup> 47 Barb. 592.<sup>8</sup> 18 Vt. 504.<sup>9</sup> 6 Conn. 453.<sup>10</sup> 11 N. H. 540.

must be considered, not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested. *Exceptions overruled.*<sup>1</sup>

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## NEWTON v. HARLAND.

IN THE COMMON PLEAS, JUNE 26, 1840.

[Reported in 1 *Manning & Granger*, 644.]

TRESPASS for an assault and battery by the defendant upon the plaintiff Frances, the wife of the plaintiff Augustus Newton.

Pleas: first, not guilty, whereon issue was joined; secondly, as to the assaulting, seizing, and laying hold of the said Frances, and pulling, thrusting, pushing, and dragging her about, and forcing and compelling her to go into a certain highway, as in the declaration mentioned, that the defendant Harland, before and at the said time when, &c., was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being at Studley, in the county of York, and being so possessed thereof, the said Frances just before the said time when, &c., to wit, on the same day and year in the declaration mentioned, was unlawfully in the said dwelling-house, and with force and arms making a great noise and disturbance therein, and at the said time when, &c., stayed and continued therein making such noise and disturbance without the leave or licence and against the will of the defendant Harland, and during all that time greatly disturbed and disquieted the defendant Harland in the peaceable and quiet possession and enjoyment of his said dwelling-house, and thereupon the defendant Harland then requested the said Frances to cease making her said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said Frances then wholly refused to do, whereupon the defendant Harland, in defence of the possession of his said dwelling-house, and the defendant Bailey, as his servant and by his command, at the said time when, &c., gently laid their hands upon the said Frances in order to remove, and did then remove, the said Frances from and out of the said dwelling-house, and in so doing did necessarily a

<sup>1</sup> *Salsbury v. Green* (R. I. 1892), 24 Atl. R. 787 (*semble*) *Accord.* — Ed.

little pull, thrust, push, and drag her about, and force and compel her to go into the said highway, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the said Frances on that occasion, which are the said supposed trespasses in the introductory part of the plea mentioned, and whereof the plaintiffs have complained against the defendants. Verification.

Replication *de injuria* to the second plea.

The cause was tried before Parke, B., at the summer assizes for the county of York, 1837. The facts were not very clearly ascertained at this trial, but, as they ultimately appeared at the subsequent trials, they were as follows: The plaintiff A. Newton, on the 1st of September, 1836, hired of the defendant Harland, for the period of six months, several rooms in a house which Harland occupied at Studley, near Ripon, in the county of York. The six months expired on the 1st of March, 1837, and the rent not having been paid, Harland on the following day, and the other defendant Bailey, as his assistant, distrained the goods of the plaintiff A. Newton; and Mrs. Newton having locked the doors of the rooms, and refused to give up the keys, Harland employed a blacksmith to pick the locks. In the evening of the same day Mrs. Newton was requested to quit the premises, and having refused, Harland again entered the rooms, accompanied by four or five persons, and compelled Mrs. Newton and her children and servants to leave the apartments, Harland himself laying hold of Mrs. Newton's arm, and leading her out.

Upon the facts as proved at the first trial, Parke, B., told the jury that the second plea was made out, and directed them to find the issue raised by that plea for the defendants. The jury having, in pursuance of this direction, found their verdict on the second issue for the defendants,

*Wilde*, Serjt., in Michaelmas term, 1837, obtained a rule for a new trial, on the ground of misdirection, contending that the evidence given in support of the second plea established no justification in respect of the assault, and that the fact of the plaintiff A. Newton being in possession of the premises having been admitted by the distress, the defendant Harland was guilty of an indictable offence in forcibly expelling Mrs. Newton and her family from the apartments.

*Alexander* and *Tomlinson*, in the following Easter term, showed cause.

TINDAL, C. J. This case involves an important question; namely, whether a landlord has a right to enter and expel by force a tenant who holds over after his term has expired. I should have great difficulty in agreeing to the affirmative of that proposition, for I do not see how the defendants can justify the expulsion of the female plaintiff under a possession obtained by an act which in itself is criminal. It seems to me that the cause must go down again to a new trial, in order that the facts with respect to the time and the manner of the entry by the defendants may be more precisely ascertained, and the matter placed

in such a shape as will enable either party, if so advised, to obtain the judgment of a court of error upon the point.

PARK and BOSQUANET, JJ., concurred.

COLTMAN, J. I express no opinion on the main point, but I think that the parties should not be concluded by the judgment of this court.

*Rule absolute.*

The cause was again tried, before Alderson, B., at the Yorkshire summer assizes, 1838. The facts having been given in evidence, and *Hillary v. Gay*,<sup>1</sup> cited on the part of the plaintiffs, the learned Baron told the jury that the questions for them to consider were, whether the apartments had been hired by the plaintiff A. Newton for a certain term which had expired, and whether Mrs. Newton, on being required to quit, had refused to do so. The learned Baron said that, if these facts were made out to their satisfaction, they must find for the defendants on the second issue; but lest the Court of Common Pleas should not agree in opinion with him, his Lordship directed the jury to assess the damages upon that issue contingently.

The jury returned their verdict for the plaintiffs on the first issue, and for the defendants on the second, and they assessed the contingent damages at £100. The counsel for the defendants, however, objected that the damages could not be so assessed without their consent, whereupon the associate entered the verdict without the assessment of damages.

*Warren*, in Michaelmas term, 1837, in pursuance of leave reserved to him at the trial, moved to enter a verdict for the plaintiffs on the second issue for the damages assessed by the jury, or for a new trial on the ground of misdirection. The court refused a rule to enter a verdict for the plaintiff on the second issue for the damages contingently assessed, as the defendants had not consented to the assessment, but granted a rule for a new trial.

The court, which was composed of TINDAL, C. J., and VAUGHAN, COLTMAN, and ERSKINE, JJ., took time to consider; but Mr. Justice VAUGHAN dying, and Mr. Justice COLTMAN differing in opinion from the Lord Chief Justice and Mr. Justice ERSKINE, the court desired that the case might be re-argued. It was accordingly again argued in Easter term last, before TINDAL, C. J., and BOSANQUET, COLTMAN, and ERSKINE, JJ.

*Tomlinson*, for the defendants.

*Newton*, in support of the rule.<sup>2</sup>

TINDAL, C. J. This case involves a question of great importance and one of very general application; namely, whether, after a tenancy has been determined by a notice to quit, the landlord may enter on the premises whilst the tenant still remains personally in possession, and after requesting him to depart and give up the possession, and his refusing so to do, may turn him out of possession by force, using as

<sup>1</sup> 6 C. & P. 284.

<sup>2</sup> The arguments of counsel are omitted. — ED.

much force and no more than is necessary for that purpose. Upon the pleadings in this case the plaintiff and his wife declare for an assault on the wife and forcing her into the street; and the defendants justify by reason of the landlord being in the lawful possession of the house, and the wife of the tenant being unlawfully therein, and disturbing him in his enjoyment thereof, whereupon they gently put out the wife, who had refused, when requested, to depart from the same.

The point above stated must be necessarily determined before this case is ultimately decided. It appears, however, to me that such question cannot, upon the present finding of the jury, be properly brought before us; but that there is a preliminary question which must be first ascertained, namely, whether, upon the facts in this case, the landlord entered upon the premises in a forcible manner, against the provisions and enactments of the statutes made against forcible entry, or, at all events, so as to render himself liable to an indictment at common law. For if the landlord, in making his entry upon the tenant, has been guilty either of a breach of a positive statute, or of an offence against the common law, it appears to me that such violation of the law in making the entry causes the possession thereby obtained to be illegal; and that the allegation in the plea that one of the defendants was lawfully in possession at the time the assault was committed is negatived.

In the present case, the defendant Harland, accompanied with five other men, entered into the apartments which had been in the plaintiff's occupation, whilst his wife still remained in possession, under circumstances which, at least, leave it as a question for the jury to determine, with proper directions from the judge at the trial of the cause, whether such entry was forcible or not. The case, indeed, was sent down by the court to a second trial for the express purpose of the jury finding this point, either in the negative or the affirmative. The point, however, has not been left to them; and I think, upon this ground, without entering into any discussion of the question to which I have above adverted, on which I forbear at present to state my opinion, that the cause should go down to another trial.

BOSANQUET, J. I agree with my Lord Chief Justice in thinking that a new trial ought to be granted in this case. Some things are clear. If a tenant hold over the land after the expiration of his term, he cannot treat the lessor who enters peaceably as a trespasser; and the lessor, in such case, may justify his own entry upon the land by virtue of his title to the possession. *Taylor v. Cole*; <sup>1</sup> *Taunton v. Costar*.<sup>2</sup> On the other hand, the lessor, who is out of possession, cannot maintain an action of trespass against the tenant holding over. He must first acquire a lawful possession before he can maintain such action. But if the lessor enter upon the land to take possession, he may treat as trespassers all those who afterwards come upon it: *Hey v. Moorhouse*; <sup>3</sup> or who, having unlawfully taken possession, wrongfully con-

<sup>1</sup> 3 T. R. 295.

<sup>2</sup> 7 T. R. 431.

<sup>3</sup> 6 New Cases, 52; 8 Scott, 156.



tinue upon the land, as in the case of *Butcher v. Butcher*,<sup>1</sup> where the defendant had come into possession of the land by intrusion, and the rightful owner, having entered, was held entitled to maintain an action of trespass against him.

The lessor may even break and enter a house, provided it be empty, which has been occupied and held over by his tenant, though the tenant may have left some of his property therein. *Turner v. Meymott*.<sup>2</sup> But no case has yet been decided in which the lessor has been held to be justified in expelling by force from a dwelling-house a person who, having lawfully come into possession of it, has merely continued to hold possession after the expiration of his title.

The lessor who is entitled to possession may acquire such possession by lawful entry; but entry by force is not lawful. Such entry is expressly prohibited by the statute 5 Rich. II. c. 7, even where entry is given by law: "The king defendeth that none shall make entry on lands and tenements but in cases where entry is given by law; and in that case not with strong hand nor with multitude of people, but only in a peaceable and easy manner." And in Bacon's Abr. Forcible Entry (B), it is laid down that, if a man enter peaceably into a house, but turns the party out of possession by force, or by threats frighten him out of possession, this is a forcible entry. It was said in one case by Lord Kenyon, *Taunton v. Costar*,<sup>3</sup> that if the party had entered and expelled the tenant by force, he might have been indicted for a forcible entry; from which it seems to have been supposed that the entry was valid, though the party entering might be indicted for it. But if the act be expressly prohibited by statute, it must, I apprehend, be illegal and void. The case before Lord Kenyon was not a case of force; and his expressions in a former case are, "A person having right of possession may peaceably assert it if he does not transgress the law of his country. He may enter peaceably and retain it, and plead *liberum tenementum*." *Taylor v. Cole*.<sup>4</sup> If the lessor enter with a strong hand, his act is unlawful, and he cannot, as it seems to me, acquire lawful possession by an unlawful act.

This is an action for assault and battery. The defendant Harland justifies his act upon the ground that he was lawfully in possession; that the plaintiff Mrs. Newton was on the premises, was required to go away, and refused, whereupon he removed her in defence of his possession, using no more force than was necessary. To maintain this plea the defendants must be prepared to show that the defendant Harland had lawfully acquired possession, which, from the reason already stated, I think he had not, if force was employed to obtain it.

The opinion of Lord Lyndhurst, in the case of *Hillary v. Gay*,<sup>5</sup> appears to me to be in point. That was an action of trespass for breaking and entering a room of the plaintiff's, being parcel of a dwelling-house. At the trial it appeared that the house belonged to the defendant, who had

<sup>1</sup> 7 B. & C. 399.

<sup>2</sup> 1 Bing. 158.

<sup>3</sup> 7 T. R. 431.

<sup>4</sup> 3 T. R. 295.

<sup>5</sup> 6 C. & P. 284.

let it to a person named Jury, who had underlet a part of it to the plaintiff; that Jury was under notice to quit at Midsummer, 1833, but that the plaintiff did not quit at that time, and the defendant had in August distrained his goods for the rent due up to Midsummer. The defendant procured a number of Irishmen to go to the house, and, after getting the plaintiff to go away, by sending a boy to tell him that he was wanted by his master, the Irishmen entered the plaintiff's room and turned his wife into the street, and put his furniture out at the window. Lord Lyndhurst held that the conduct of the defendant could not be justified.

It is quite unnecessary to say whether, if the defendant had quietly entered and obtained possession of the house while the plaintiff's wife remained in possession of her apartment, he could have justified turning her out by force. The passage referred to in Bacon's *Abr. tit. Forcible Entry and Detainer* (B), treats the force employed in turning a party out as making the original entry, though peaceable, a forcible entry within the meaning of the statute. In *The King v. Wilson*,<sup>1</sup> Lord Kenyon says, "It is alleged that twelve persons, with force and arms, and with a strong hand, entered into a certain mill and lands and houses, and expelled the prosecutor; if these facts be proved as laid, God forbid that it should not be an indictable offence! the peace of the whole country would be endangered if it were not so;" and afterwards adds, "In supporting the indictment we shall give effect to a part of the law that ought to be preserved; namely, that no one shall with force and violence assert his own title." Mr. Justice Grose says that the words of the indictment clearly amount to a public breach of the peace. Mr. Justice Lawrence says: "In an indictment on the statute it is sufficient to state the defendant entered with a strong hand, it being considered that these words imply that the entry was accompanied with that terror and violence which constitute the offence. All that is required is, that it should appear by the indictment that such force and violence have been used as constitute a breach of the peace."

In the present case there was evidence tending to show that the entry of the defendant was made with a strong hand, and accompanied with such acts of violence as to bring the case within the prohibition of the statute of 5 Rich. II. But this evidence appears to have been considered by the learned judge as immaterial, for he said the only questions were, whether the rooms were let for a certain term, whether the term was over, and, if so, whether the plaintiff, when required, would not go out. If that was proved, he said, the verdict in law must be for the defendant.

This direction appears to me to be incorrect, and that there ought therefore to be a new trial.<sup>2</sup>

COLTMAN, J. Having the misfortune in this case to differ from the rest of the court, it is right that I should state the grounds of my opin-

<sup>1</sup> 8 T. R. 360.

<sup>2</sup> The concurring opinion of Erskine, J., is omitted. — Ed.

ion; but as the case will go to a new trial, and the question may be raised in a more formal way on the record, it will be sufficient to state them very briefly.

The law of England recognizes two modes of asserting the right to lands wrongfully withheld, — by entry and by action.

In the cases by which the remedy by entry was allowed, where, to use the phrase so familiarly met with in our old books, the entry is congeable, the remedy by entry was looked upon as favorably as the remedy by action. The effect of such an entry is, that it gives a man seisin, or puts into immediate possession him that has right of entry on the estate, and thereby makes him complete owner. 3 Bl. Comm. 176. Agreeably to this, Mr. Justice Bayley said, in the case of *Butcher v. Butcher*:<sup>1</sup> “I think that a party having the right to the land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of the entry, wrongfully continues on the land.”

I am not aware that any doubt exists that, after the entry made, he may turn any ordinary trespasser off the land; and I am unable to see any principle which should prevent him from treating his tenant at sufferance in the same way, for such a tenant is a mere wrong-doer. Co. Litt. 57 *b*; *Pike and Hassen's Case*; <sup>2</sup> *Sir Moil Finche's Case*.<sup>3</sup>

But it is said that a person who has a right of entry ought to enter peaceably. The true doctrine on this subject is stated, as I apprehend, correctly in the case of *Taylor v. Cole*,<sup>4</sup> where it is said: “It is true, persons having only a right are not to assert that right by force; if any violence is used, it becomes the subject of a criminal prosecution.” So, in *Taunton v. Costar*,<sup>5</sup> it is said: “If the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term.”

For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance, being himself a wrong-doer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although, by those statutes, all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the *Year-Book*, 9 Hen. VI. 19; 15 Hen. VII. 17; F. N. B. 248 H.

On these grounds I am of opinion that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal

<sup>1</sup> 7 B. & C. 399.

<sup>2</sup> 8 Leon, 233.

<sup>3</sup> 2 Leon, 143.

<sup>4</sup> 3 T. R. 295.

<sup>5</sup> 7 T. R. 431.

prosecution, yet that, as against the plaintiffs, who are wrong-doers, and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them, in like manner as in the case of any other trespasser. *Rule absolute.*<sup>1</sup>

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## BEDDALL v. MAITLAND.

IN CHANCERY, BEFORE SIR EDWARD FRY, J., MARCH 8, 1881.

[Reported in 17 Chancery Division, 174.]

THE defendant on the 23d of March, 1880, delivered a statement of defence and counter-claim.<sup>2</sup>

In his counter-claim he alleged that Poulton, aided and abetted therein by Beddall, on the 5th of January, 1880, unlawfully and by force broke into and ejected the defendant from the house occupied by him and violently put him and his family out of the house, and also violently and recklessly threw thereout and unlawfully took possession of and damaged his goods and effects, and by such unlawful acts greatly injured the defendant <sup>244</sup> and caused him damage to the amount of £1000. And the defendant claimed damages for alleged breaches of contract by the plaintiffs respectively, and also in respect of the injuries alleged to have been committed by them respectively.

By the evidence at the trial it appeared that on the 5th of January, 1880, a Mr. Robertson, who was a clerk to the plaintiffs' solicitors, by the instructions of Poulton, went, accompanied by several men, to the nursery to demand from the defendant immediate possession. According to Robertson's evidence, he was admitted without any resistance at the front door of the house, and told the defendant what he had come for. They had some conversation together, and they then went out of the house together to look at the stock in the nursery. While they were outside, the defendant suddenly ran back into the house and locked the door, and refused to allow Robertson to re-enter. Robertson, then, with the assistance of the men he had brought with him, forcibly broke

<sup>1</sup> *Hillary v. Gay*, 6 C. & P. 284; *Edwick v. Hawkes*, 18 Ch. D. 199; *Denver R'y v. Harris*, 122 U. S. 597, 607; *Larkin v. Avery*, 23 Conn. 304; *Reeder v. Parady*, 41 Ill. 279; *Comstock v. Brosseau*, 65 Ill. 43; *Todd v. Jackson*, 2 Dutch. 525, 531; *Hyatt v. Wood*, 3 Johns. 239; 4 Johns. 150, 160; *Parsons v. Brown*, 15 Barb. 590; *Wood v. Phillips*, 43 N. Y. 152; *Bliss v. Johnson*, 73 N. Y. 529; *McMillan v. Cronin*, 75 N. Y. 474, 478; *Bristor v. Burr*, 120 N. Y. 427; *O'Donnell v. McIntyre*, 37 Hun, 623, 627 (see *Scribner v. Beach*, 4 Den. 448, 451); *Pilford v. Armstrong*, *Wright (Ohio)*, 94; *Sinclair v. Stanley*, 69 Tex. 718; *Dustin v. Cowdry*, 23 Vt. 631 (*semble*) *Accord*.

See also *Canavan v. Gray*, 64 Cal. 5; *Franck v. Wiegert*, 56 Mich. 472, 476.

The law of Scotland seems to accord with *Newton v. Harland*. *Smith, Law of Damages*, 124, 125. — ED.

<sup>2</sup> Only so much of the case is given as relates to the counter-claim. The arguments of counsel are also omitted. — ED.

open the back door of the house. The defendant offered no further resistance, and then Robertson and his men turned the defendant and his family out, and put his furniture out of the house.

According to the defendant's evidence, Robertson obtained possession in the first instance by force.

*Beaumont*, for the defendant.

*Cookson*, Q. C., and *E. S. Ford*, for the plaintiffs.

Fry, J. The question which I reserved for further consideration arises on the defendant's counter-claim. The claim subdivides itself into two heads, — the one for the forcible entry and eviction, the other for the injury done to the defendant's furniture and effects; and, in my judgment, separate considerations arise with regard to these two heads. According to the evidence the defendant was, in my judgment, in possession of the house by leave of the owners, it having been occupied by him as the manager of the nursery. He was not in possession of the house in the same sense as he was in possession of the nursery; with regard to the nursery he was in the position of an ordinary servant, being only the manager for the plaintiffs; but he was by the plaintiffs' permission in the exclusive possession of the house. That permission, however, had been withdrawn before the 8th of January, and the defendant had retained possession and was then in possession as a wrongdoer. Upon the evidence I come to the conclusion that a forcible entry was made by Robertson on the 8th of January as agent of the plaintiff Poulton only, but that the plaintiff Beddall had nothing to do with it. Different accounts of what took place are given by Robertson, and by the defendant, but it appears to me immaterial which account is true, for in either view the defendant's possession at the time when the forcible entry was made was wrongful. The questions which then arise are complicated by this consideration, that, if the possession of the defendant was unlawful, the forcible entry of the plaintiff was also unlawful. The taint of unlawfulness attaches to them both. The unlawfulness of the plaintiffs' entry arises under the statute 5 Rich. 2, stat. 1, c. 8, which enacts, "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, — that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the for-

cible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Rich. 2 creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is *Newton v. Harland*, a case in which a great difference of opinion was evinced between the learned judges before whom it came. It was tried three times, first before Baron Parke, secondly before Baron Alderson, and thirdly before Mr. Justice Coltman, and came three times before the Court of Common Pleas in Banc, and it must, in my judgment, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defence of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron Parke and Baron Alderson, that the defence failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of *Pollen v. Brewer*,<sup>1</sup> and it is also clear from other cases. No doubt, in *Harvey v. Brydges*,<sup>2</sup> Baron Parke and Baron Alderson expressed their disapproval of *Newton v. Harland*; but they were the judges who had tried that case, and whose opinions had been overruled by the court in Banc. In *Davison v. Wilson*<sup>3</sup>—an action for eviction—it was held that the averments in the declaration “with force and arms, with a strong hand, and against the form of the statute,” were, on the pleadings, allegations of matter of aggravation only, and not of a separate cause of action, and therefore the plea of *liberum tenementum* prevailed. The case of *Meriton v. Coombes*,<sup>4</sup> in my opinion, supports the same view. The only other case to which it is necessary for me to refer is *Lows v. Telford*.<sup>5</sup> There the action was brought for a malicious prosecution. The defendant, who was the mortgagee in fee of certain premises which the plaintiffs had been allowed by the mortgagor to occupy, entered into actual possession of the premises by forcing the lock of the outer door in the absence of the occupiers. The plaintiffs then entered by force and ejected the defendant. The defendant indicted them for a forcible entry, and they were

<sup>1</sup> 7 C. B. N. S. 371.<sup>2</sup> 14 M. & W. 437.<sup>3</sup> 11 Q. B. 890.<sup>4</sup> 9 C. B. 787.<sup>5</sup> 1 App. Cas. 414.

acquitted. They then brought the action against the defendant for a malicious prosecution. It was held by the House of Lords that they could not sustain the action, on the ground that there was reasonable cause for the indictment, because the statute makes a forcible entry equally unlawful, whether the person in possession is or is not the lawful owner of the property. I think that none of those cases in any way countervail *Newton v. Harland*, which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for the forcible entry and eviction, the defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed. I shall refer it to Chambers to ascertain the amount of the damages. With regard to the costs, I have already dismissed the rest of the counter-claim, and I am giving the defendant only a very small portion of the relief which he asked. I must either apportion the costs of the counter-claim, or I must give the relief without costs. I think the latter course the preferable one.<sup>1</sup>

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ELLEN B. LOW v. ZENO P. ELWELL AND WIFE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOV. 29, 1876.

[Reported in 121 *Massachusetts Reports*, 309.]

GRAY, C. J.<sup>2</sup> A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant, as against him, has no right of occupation whatever. He cannot maintain an action, in the nature of trespass to his person, for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord, having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as

<sup>1</sup> *Millar v. Long*, 75 *Law Times*, 428 *Accord.* — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual. To hold otherwise would enable a person, occupying land utterly without right, to keep out the lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.

This view of the law, notwithstanding some inconsistent opinions, is in accordance with the current of recent decisions in England and in this Commonwealth.

In *Turner v. Meymott*<sup>1</sup> it was decided that a tenant whose term had expired could not maintain trespass against his landlord for forcibly breaking and entering the house in his absence. In *Hillary v. Gay*,<sup>2</sup> indeed, Lord Lyndhurst at *nisi prius*, while recognizing the authority of that decision, ruled that if the landlord, after the expiration of the tenancy, by force put the tenant's wife and furniture into the street, he was liable to an action of trespass *quare clausum fregit*. And in *Newton v. Harland*, a majority of the Court of Common Pleas, overruling decisions of Baron Parke and Baron Alderson at *nisi prius*, held that under such circumstances the landlord was liable to an action of trespass for assault and battery.

But in *Harvey v. Brydges*,<sup>3</sup> Baron Parke stated his opinion, upon the point raised in *Newton v. Harland*, as follows: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." Baron Alderson concurred, and said that he retained the opinion that he expressed in *Newton v. Harland*, notwithstanding the decision of the majority of the Court of Common Pleas to the contrary. The opinion thus deliberately adhered to and positively declared by those two eminent judges, though not required by the adjudication in *Harvey v. Brydges*, is of much weight. In *Davis v. Burrell*<sup>4</sup> Mr. Justice Cresswell said, that the doctrine of *Newton v. Harland* had been very much questioned. And it was finally overruled in *Blades v. Higgs*,<sup>5</sup> where, in an action for an assault by forcibly taking the defendant's property from the plaintiff's hands, using no more force than was necessary, Chief Justice Erle, delivering the unanimous judgment of the

<sup>1</sup> 7 Moore, 574; s. c. 1 Bing. 158.

<sup>2</sup> 6 C. & P. 284.

<sup>3</sup> 14 M. & W. 437.

<sup>4</sup> 10 C. B. 821, 825.

<sup>5</sup> 10 C. B. (N. S.) 713.



court, approved the statement of Baron Parke, above quoted, and added: "In our opinion, all that is so said of the right of property in land applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury, instead of redressing it." See also *Lows v. Telford*.<sup>1</sup>

In *Commonwealth v. Haley*<sup>2</sup> the case was upon an indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action.

The judgment in *Sampson v. Henry*<sup>3</sup> turned upon a question of pleading. The declaration, which was in trespass for an assault and battery, alleged that the defendant assaulted the plaintiff, and with a deadly weapon struck him many heavy and dangerous blows. The pleas of justification merely averred that the defendant was seised and had the right of possession of a dwelling-house, that the plaintiff was unlawfully in possession thereof, and forcibly opposed the defendant's entry, and that the defendant used no more force than was necessary to enable him to enter and to overcome the plaintiff's resistance; but did not deny the use of the dangerous weapon and the degree of violence alleged in the declaration; and were therefore held bad, in accordance with *Gregory v. Hill*,<sup>4</sup> there cited. The remarks of Mr. Justice Wilde, denying the right of a party dispossessed to recover possession by force and by a breach of the peace, would, if construed by themselves, and extended beyond the case before him, allow the tenant to maintain an action of trespass against the landlord for entering the dwelling-house, in direct opposition to the judgment delivered by the same learned judge, in another case, between the same parties, argued at the same term and decided a year after. *Sampson v. Henry*.<sup>5</sup>

In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held that the plea of *liberum tenementum* was a good justification of the charge of breaking and entering the house, but not of the personal assault and battery. That decision, so far as it held that the landlord was not liable to an action of trespass *quare clausum fregit* by a tenant at sufferance for a forcible entry, has been repeatedly affirmed. *Meader v. Stone*; <sup>6</sup> *Miner v. Stevens*; <sup>7</sup> *Mason v. Holt*; <sup>8</sup> *Curtis v. Galvin*; <sup>9</sup> *Moore v. Mason*.<sup>10</sup> And, so far as it allowed the plaintiff to recover, in such an action, damages for the incidental injury to him or to his personal property, it has been overruled. *Eames v. Prentice*; <sup>11</sup> *Curtis v. Galvin*, *ubi supra*.

It has also been adjudged that a landlord, who, having peaceably

<sup>1</sup> 1 App. Cas. 414, 426.

<sup>4</sup> 8 T. R. 299.

<sup>7</sup> 1 Cush. 482, 485.

<sup>10</sup> 1 Allen, 406.

<sup>2</sup> 4 Allen, 318.

<sup>5</sup> 13 Pick. 36.

<sup>8</sup> 1 Allen, 45.

<sup>11</sup> 8 Cush. 337.

<sup>3</sup> 11 Pick. 379.

<sup>6</sup> 7 Met. 147.

<sup>9</sup> 1 Allen, 215.

entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action for an assault, if he uses no more force than is necessary for the purpose. *Mugford v. Richardson*;<sup>1</sup> *Winter v. Stevens*.<sup>2</sup> For the reasons already stated, we are all of opinion that a person who has ceased to be a tenant, or to have any lawful occupancy, has no greater right of action when the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.

Our conclusion is supported by the American cases of the greatest weight. *Jackson v. Farmer*;<sup>3</sup> *Overdeer v. Lewis*;<sup>4</sup> *Kellam v. Janson*;<sup>5</sup> *Stearns v. Sampson*;<sup>6</sup> *Sterling v. Warden*.<sup>7</sup> The opposing decisions are so critically and satisfactorily examined in an elaborate article upon this subject in 4 *Am. Law Rev.* 429, that it would be superfluous to refer to them particularly.

The tenancy of the plaintiff's husband under an oral lease was but a tenancy at will, which, by the written lease from his landlord to the defendant, and reasonable notice thereof, was determined, and he became a mere tenant at sufferance. *Pratt v. Farrar*.<sup>8</sup> It being admitted that, if the defendants had the right to remove the plaintiffs by force, no more force was used than was reasonably necessary, this action cannot be maintained.

*Plaintiff nonsuit*.<sup>9</sup>

## HARVEY v. MAYNE.

IN THE COMMON PLEAS, IRELAND, JANUARY 31, 1872.

[*Reported in Law Reports, 6 Common Law, 417.*]

ACTION for assault and false imprisonment. Second plea: That before and at the time of the alleged trespasses the plaintiff had wrongfully in his possession a certain chattel of the defendants, — that is to say, a certain check drawn by the defendants upon the Ulster Bank, — without the leave and against the will of the defendants; and the plaintiff was then in the office of the defendants, of his own will and accord, and by the license of the defendants, and was then about wrongfully and unlawfully to take and carry away the said check and convert it to his own use; and the defendants then required the plain-

<sup>1</sup> 6 Allen, 76.

<sup>2</sup> 9 Allen, 526.

<sup>3</sup> 9 Wend. 201.

<sup>4</sup> 1 W. & S. 90.

<sup>5</sup> 17 Penn. St. 467.

<sup>6</sup> 59 Maine, 568.

<sup>7</sup> 51 N. H. 217.

<sup>8</sup> 10 Allen, 519.

<sup>9</sup> *Manning v. Brown*, 47 Md. 506, 512 (*semble*); *Coughlin v. Gray*, 131 Mass. 56; *Stone v. Lahey*, 133 Mass. 426; *Twombly v. Monroe*, 136 Mass. 464, 467 (but see *Sampson v. Henry*, 11 Pick. 379, 13 Pick. 36; *Churchill v. Hulbert*, 110 Mass. 426); *Sterling v. Warden*, 51 N. H. 217, 236; *Souter v. Codman*, 14 R. I. 119; *Allen v. Kelly* (R. I. 1892), 24 Atl. R. 776 *Accord*. — *Ed.*

tiff to refrain from carrying away and converting the said check, and to give up the possession thereof to the defendants, which the plaintiff then refused to do, and thereupon the defendants gently laid hands on the plaintiff, and detained him in the said office of the defendants, in order to prevent his carrying away and converting the said check as aforesaid, and not otherwise; doing no more, and detaining the plaintiff no longer, than was necessary, which are the alleged trespasses.

Demurrer.

*Kisbey* (with him *H. Law, Q. C.*), in support of demurrer.

*Mulholland*, contra.<sup>1</sup>

*Cur. adv. vult.*

The judgment of the court was pronounced by

MORRIS, J. The plea demurred to does not allege that the acts complained of were done for the purpose of retaking the defendants' goods. It has been argued that such an allegation should be intended, and, for the purposes of this decision, we shall assume that the plea contains it by implication.

The first case in which such a defence appears to have been pleaded to an action for imprisonment is *Chambers v. Miller and others*.<sup>2</sup> The plaintiff took issue on the plea; and the question at the trial appears to have been, whether the goods which the plaintiff endeavored to take away were, at the time of the commission of the acts complained of, the property of the plaintiff or of the defendants. A verdict having been found for the plaintiff, the case came before the Court of Common Pleas,<sup>3</sup> on a motion to enter a verdict for the defendants. The only question reserved for the consideration of the court was, whether, under the peculiar circumstances of the case, the property in the goods had passed to the plaintiff? And the legal validity of the defence did not come into question. In a very learned note to the report of the case in *Foster and Finlayson*, vol. iii. pp. 202 *et seq.*, the reporter points out that there is no authority for such a defence. *Blades v. Higgs* shows that the owner of goods, which are wrongfully in the possession of another, may justify an assault involving no unnecessary violence, in order to repossess himself of his property; but there is nothing in that case to justify the extension of the principle on which it was decided to an imprisonment and detention for an indefinite time. The demurrer must, therefore, be allowed, with costs.

*Demurrer allowed*.<sup>4</sup>

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> 3 F. & F. 202.

<sup>3</sup> 13 C. B. N. S. 125.

<sup>4</sup> See *Hudson v. Slade*, 3 F. & F. 390; *Davis v. Whitridge*, 2 Strob. 232. — Ed.

## BEATTIE v. MAIR.

IN THE EXCHEQUER DIVISION, IRELAND, MAY 12, 1882.

[*Reported in Law Reports, 10 Irish, 208.*]

PALLES, C. B.<sup>1</sup> The question raised by the demurrer to the statement of defence is, whether an action can be maintained by a person who was in possession of lands, without title, against the true owner of the lands, for, with force and strong hand entering the land, expelling the plaintiff from the possession, and taking goods the property of the defendant, then being on the lands.

The statement of claim does not contain any allegation of assault. It is unnecessary, therefore, to consider whether *Newton v. Harland* is now law, or the effect (if any) on that decision of the *dicta* of Lord Wensleydale and Baron Alderson in *Harvey v. Brydges*<sup>2</sup> (apparently approved of by Lord Selborne in *Lows v. Telford*)<sup>3</sup> and *Blades v. Higgs*.

However that may be, I think it clear, upon principle and authority, that a civil action cannot be maintained against the true owner by one wrongfully in possession, merely for expelling him by force and with a strong hand from his unlawful possession. No doubt such expulsion is rendered wrongful by our statute 10 Car. 1, sess. 3, c. 13 (similar to 21 Jac. 1, c. 15, England); but the prohibition contained in the statute is clearly one for the public generally; and according to the ordinary rule of construction, the remedy given by such a statute is a remedy by indictment, unless a particular individual has sustained some special damage, some particular injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by the infringement of the law. I am clearly of opinion that eviction by the true owner from the possession of lands in which the plaintiff is in wrongful possession cannot be either general or special damage. So much for the question of principle. As to authority, *Pollen v. Brewer*<sup>4</sup> seems to me to be precisely in point. No doubt there the fourth count, on which the question arose, was in trespass for breaking and entry; and there was neither a special count in the form adopted in the present case, or a replication relying upon the force; but the decision, that damages for the expulsion were not recoverable, is equally in point in an action upon the statute, where, as I conceive, the plaintiff is bound to show special and peculiar damage.

For the same reason, the taking of the goods cannot amount to special damage, as they are shown to have been the defendant's own goods. Whilst *Beddall v. Maitland* is a direct authority against the

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 14 W. & M., at p. 442.

<sup>3</sup> 1 App. Cas., at p. 426.

<sup>4</sup> 7 C. B. N. S. 371.

claim of the plaintiff here, in respect of the eviction, it is not in point in his favor as to the taking of the goods, as there the furniture in respect of which damages were given were the plaintiff's. *Edwick v. Hawkes*<sup>1</sup> does not apply, as there Mr. Justice Fry decided that the plaintiff's estate had not been determined.

Having, however, referred to these two cases, the one of which decided and the other assumed that *Newton v. Harland* was still law, I desire to say that I hold myself free to consider that question in any case which may hereafter demand its determination.

FITZGERALD and DOWSE, BB., concurred.<sup>2</sup>

## BURLING v. READ.

IN THE QUEEN'S BENCH, APRIL 20, 1850.

[Reported in 11. *Queen's Bench Reports*, 904.]

**TRESPASS.** The first count charged that defendants, on, &c., with force and arms and with a strong hand, broke and entered a workshop

<sup>1</sup> 18 Ch. Div. 199.

<sup>2</sup> *Pollen v. Brewer*, 7 C. B. N. S. 371; *Delany v. Fox*, 1 C. B. N. S. 174, 179; *Tribble v. Frame*, 7 J. J. Marsh. 604; *Manning v. Brown*, 47 Md. 506; *Sampson v. Henry*, 13 Pick. 36; *Meador v. Stone*, 7 Met. 147; *Mugford v. Richardson*, 6 All. 76; *Merriam v. Willis*, 10 All. 118; *Fuhr v. Dean*, 26 Mo. 116; *Harris v. Gillingham*, 6 N. H. 11; *Sterling v. Warden*, 51 N. H. 217, 222; *State v. Morgan*, 59 N. H. 322; *Todd v. Jackson*, 2 Dutch. 525; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *M'Dougall v. Sticher*, 1 Johns. 42; *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 Johns. 235; *Jackson v. Seelye*, 16 Johns. 197; *Jackson v. Farmer*, 9 Wend. 201; *Bliss v. Johnson*, 73 N. Y. 529 (*semble*); *Walton v. File*, 1 Dev. & Bat. 567; *Barnes v. Dean*, 5 Watts, 543; *Kellam v. Johnson*, 17 Pa. 467; *Adams v. Adams*, 7 Phila. 160; *Muldrow v. Jones*, Rice (S. Car.) 64; *Johnson v. Hannahan*, 1 Strob. 313; *Simmons v. Parsons*, 1 Bail. (S. Car.) 62; *Myers v. Myers*, 1 Bail. (S. Car.) 306; *Roberts v. Tarver*, 1 Lea, 441; *Beecher v. Parnele*, 9 Vt. 352 *Accord*.

*Larkin v. Avery*, 23 Conn. 304; *Baker v. Hays*, 28 Ill. 387; *Shoudy v. School Directors*, 32 Ill. 290; *Page v. DePuy*, 40 Ill. 506; *Reeder v. Purdy*, 41 Ill. 279; *Wilder v. House*, 48 Ill. 279; *Farwell v. Warren*, 51 Ill. 467; *Comstock v. Brosseau*, 65 Ill. 39; *Haskins v. Haskins*, 67 Ill. 446; *Illinois Co. v. Cobb*, 68 Ill. 53, 94 Ill. 55; *Dearlove v. Harrington*, 70 Ill. 251; *Doty v. Burdock*, 83 Ill. 473; *Fort Dearborn v. Klein*, 115 Ill. 177 (*semble*); *Westcott v. Arbuckle*, 12 Ill. Ap. 577; *M'Donald v. Lightfoot*, *Morris (Iowa)*, 450; *Moore v. Boyd*, 24 Me. 242; *Brock v. Berry*, 31 Me. 293 (see *Stearns v. Sampson*, 59 Me. 568); *Emerson v. Sturgeon*, 59 Mo. 404; *Mosseller v. Deaver*, 106 N. Ca. 494; *Dustin v. Cowdry*, 23 Vt. 631; *Whittaker v. Perry*, 38 Vt. 107 *Contra*.

*A fortiori* where there is no personal violence to the wrongful possessor by the forcible entry of the true owner, as where the entry is made during the temporary absence of the possessor, the latter cannot maintain trespass *quare clausum fregit*. *Turner v. Meymott*, 1 Bing. 158; *Hoffman v. Harrington*, 22 Mich. 52; *Stearon v. Wooldrich*, 18 Minn. 354; *Todd v. Jackson*, 2 Dutch. 525; *Roberts v. Preston*, 106 N. Ca. 411; *Freeman v. Wilson*, 16 R. I. 524; *Mussey v. Scott*, 32 Vt. 82. But see, *contra*, *Mason v. Hawes*, 52 Conn. 12. — Ed.

of plaintiff, in which plaintiff was, at the said several days, &c., inhabiting and actually present, and then while the plaintiff was actually present in the said workshop, pulled it down, and destroyed it, &c.

Pleas. Fourth.<sup>1</sup> Except so far as the same charges defendants with having committed the supposed trespasses with a strong hand, and whilst plaintiff was inhabiting the said workshop, and actually present: that, before and at the said several times when, &c., defendants, W. Pate the elder and W. Pate the younger, were the churchwardens, and James Rose and Jonathan Tyson were the overseers of the poor, of the said parish of Haddenham, duly appointed; and that the said workshop, at the several times when, &c., was the workshop, soil, and freehold of the said churchwardens and overseers: wherefore defendants W. Pate the elder and W. Pate the younger, as such churchwardens in their own right, and Read, R. Pate, and W. M. Pate, as the servants of the said churchwardens and overseers and by their command, at the several times when, &c., broke, &c.: justifying the breaking and entering the workshop, making a noise, &c., breaking, &c., the chimneys, &c., and pulling down, &c., the workshop, and seizing, &c., the materials, &c., and removing the goods and chattels as encumbering, &c.: verification. Replication: that the workshop was not the workshop, soil, and freehold of the churchwardens, &c., or any or either, &c.: conclusion, to the country. Issue thereon.

On the trial, before Pollock, C. B., at the last Cambridgehire assizes, evidence was given, for the plaintiff, to show that he had built the workshop, and that the defendants entered and took possession of it, and pulled it down, while the plaintiff was in it; and for the defendants, to show that the parish officers were legally entitled to the soil under stat. 59 Geo. III. c. 12, § 17. The Lord Chief Baron told the jury that, if they were satisfied that the plaintiff had no right to the possession of the workshop, and the parish officers had title to it, they were entitled to take immediate possession, and, when so in possession, to pull the workshop down; and that in that case the fourth issue, so far as regarded the workshop and all affixed to the freehold, must be found for the defendants;<sup>2</sup> for that, as to that issue, it was immaterial whether, at the time of the act complained of, the plaintiff was or was not in the house. The jury found for the defendants on the fourth issue.

*Prendergast* now moved for a new trial, on the ground of misdirection.

LORD CAMPBELL, C. J. I think the direction was quite right, though there is on the record the immaterial allegation of the plaintiff being actually in the workshop. The plaintiff is a trespasser: what right can he have to prevent the owner of the soil from pulling down the

<sup>1</sup> Only what relates to this plea is given. The argument for the defendant is also omitted.

<sup>2</sup> See *Jones v. Chapman*, 2 Exch. 803.

house? I pronounce no opinion against the decision in *Perry v. Fitzhowe*; <sup>1</sup> I assume it to be right; but that case is clearly distinguishable from this, where the house is not the dwelling-house of the plaintiff, and where the act complained of is the act not of a commoner who seeks to abate a nuisance, but of the owner of the house. It would be giving a most dangerous extension to the doctrine in *Perry v. Fitzhowe* (assuming the decision there to be correct), if we were to hold that the owner of a house could not exercise the right of pulling it down, because a trespasser was in it.

PATTESON, J. In *Perry v. Fitzhowe* the action was brought by the owner of the house, who was in it at the time of its being destroyed; and the justification set up was by a person entitled to common on the land where the house was built, who made no claim to title in the house: and we held that the commoner could not assert his right of common by knocking a house about the ears of the owner. There was no pretence that the house was not the house of the plaintiff. But here the defendants say that the plaintiff is a mere stranger, and the jury so find. It never can be that a mere stranger acquires a title by intrusion, except in the time prescribed by the Statutes of Limitation. The inhabiting makes no difference: it cannot prevent the owner of a house from doing what he likes with it. The plaintiff here has no right at all. In *Perry v. Fitzhowe* he had the right to the possession. That case seems to have led to a mode of declaring under circumstances to which the decision is inapplicable. It seems to be now the fashion, in all cases of trespass to a house, to say that the trespass was committed while the plaintiff was in it.

WIGHTMAN, J. I agree, and for the reasons given by my Lord and my brother Patteson.

ERLE, J. It is very important that the distinction between *Perry v. Fitzhowe* and such a case as this, pointed out by my Lord and my brother Patteson, should be understood. Otherwise parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut, and occupying it before morning. It should be made known that that is a misapprehension of the effect of *Perry v. Fitzhowe*.

*Rule refused.*

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EDWARD C. MILLS v. JOSIAH F. WOOTERS.

IN THE SUPREME COURT, ILLINOIS, JUNE, 1871.

[Reported in 59 Illinois Reports, 234.]

PER CURIAM. Appellant brought an action of trespass, for the forcible taking of a cow.

The facts are, briefly: that the cow, at the time of the alleged taking, was in the possession of a third party; that appellant had sold

<sup>1</sup> 8 Q. B. 757.

her to one Oliver for \$35, and had received in payment \$29, and that appellee had purchased her of Oliver and paid for her, and in a conversation between the parties, appellant said, he had sold her to Oliver, and that appellee might take her.

It is contended, in argument, that the alleged trespass was an outrageous invasion of the rights of the citizen. The language of appellee, at the time he took the cow, was reprehensible. He, and those with him, may have been guilty of a riot. A breach of the peace may have been committed.

All this would not constitute trespass in the taking of the property. Consent was given for that, and then the payment was made to Oliver. The property then belonged to appellee. He was the owner, and had the right to use sufficient force to obtain possession. He was not, however, justified in committing an assault, or a breach of the peace.

After the agreement between the parties it would be manifestly unjust, and in violation of every principle of law and right, to permit appellant to retain the cow. He must abide by his promise fairly made.

The judgment must be affirmed.

*Judgment affirmed.*<sup>1</sup>

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## ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1466.

[Reported in Year-Book, 6 Edward IV., folio 7, placitum 18.]

A MAN brought a writ of trespass *quare vi et armis clausum fregit, etc., et herbam suam pedibus conculcando consumpsit*, and supposed the trespass in five acres; and the defendant says, as to the coming, &c., and as to the trespass in the five acres, not guilty; and as to the trespass in the five acres, *actio non*; for he says that he himself has an acre of land upon which a thorn-hedge is growing, adjoining the said five acres, and the defendant, at the time of the trespass alleged, came and cut the thorns, and they, *ipso invito, cecidere* on the said acres of the plaintiff, and the defendant went quickly upon the said acres, &c., and took them, which is the same trespass for which he has conceived his action, &c.; and upon this they demurred, &c., and it was well argued and adjourned. And now *Catesby* says: Sir, it has been said that if one does an act, though lawful, whereby wrong and damage is done to another against his will, still if he in any way could have avoided it, &c., then he shall be punished therefor, &c. Sir, it seems to me the other way; and as I understand it, if one does a lawful act whereby damage comes to another against his will, he shall not be punished at all, &c. As if I drive my cattle along the highway,

<sup>1</sup> Hyatt v. Wood, 4 Johns. 150, 158 (*semble*); Scribner v. Beach, 4 Den. 448, 451; Spencer v. McGowen, 13 Wend. 256; Hurd v. West, 7 Cow. 752; Taylor v. Welby, 36 Wis. 42 *Accord.* — Ed.



and you have an acre of ground adjoining, and my cattle enter upon your land and eat your grass, and I come freshly and drive them out: in this case you shall have no action against me, because then it was lawful to drive them out, and their entry upon the land was against my will; and no more here, for the cutting was lawful, and the falling upon your land was against my will, therefore the retaking was good and lawful, &c. And, sir, I put a case, that I am cutting my trees, and the boughs fall upon a man and kill him; in this case I shall not be attainted as of felony, for my cutting was lawful, and the falling upon the man was against my will, and no more here, &c. *Fairfax*. It seems to me just the other way, and I say that there is a diversity between an act resulting in a felony and one resulting in trespass, for in the case put by Catesby there was no felony, for felony is of malice prepense, and when it was against his will it was not *animo felonico*, &c., but if one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c.; and, also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, it is no felony, as has been said, &c.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, &c., and the wrong which the other received was against his will, &c., and so here, &c.

*Yonge*. I think differently; and in such a case, where one has *damnum absque injuria*, in this case he shall have no action, for he has no wrong, and there is no reason for his recovering damages; and so it was here, when he went upon the land to get the thorns which had fallen, this entry was not tortious, for when he cut them, and they fell on the close, *ipso invito*, the property in them was in him, and therefore it was lawful for him to take them out of the close; therefore, notwithstanding the damage, no wrong was suffered, &c.

*Brian*. It seems to me the other way, and to my intent, when one does an act he is bound to act in such a way as not to prejudice others, &c. As if I am building a house, and a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action &c.; and yet the raising of the house was lawful, and the timber fell, *me invito*, &c. And so if one assaults me and I cannot escape, and I in self-defence lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my act was lawful, and I hit him, *me invito*, &c.; and so here, &c.

LITTLETON, J. To the same intent, and if a man is damaged, he ought to be recompensed; and to my intent the case put by Catesby is not law, for if your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. But if cattle stray upon a man's land, the lord cannot distrain them for rent because when a lord distrains for rent, he is to hold the distress till his rent is paid, and so he cannot in the case aforesaid, for if I will offer sufficient amends, I shall have my cattle again, &c.; and in a writ of

rescous of cattle taken *damage feasant*, it is a good plea for one to say that he tendered sufficient amends, &c.; and, sir, if this should be law, that he might enter and take the thorns, for the same reason, if he cut a large tree, he might come with his wagons and horses to carry the tree off, which is not reason, for perhaps he has corn or other crops growing, &c.; and no more here, for the law is all one in great things and small, &c., and so according to the quantity of the trespass he should have amends.

CHOKE, C. J. To the same intent, for when the principle was not lawful, that which depends upon it is not lawful; for when he cut the thorns and they fell on my land, this falling was not lawful, and therefore his coming to take them out was not lawful. As to what was said about their falling *ipso invito*, that is no plea, but he ought to show that he could not act in any other way, or that he did all that was in his power to keep them out, &c., or else he shall pay damages, &c. And, sir, if the thorns on a great tree had fallen on his land by force of the wind, in this case he might have come in to get them, because the falling was not his act, but by force of the wind, &c. 21 Hen. VII. fol. 28.

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### TAYLER v. FISHER.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[Reported in *Croke's Elizabeth*, 246.]

TRESPASS for breaking his house and taking away a corssett and a pike of the plaintiff's. The defendant pleaded that, long time before the trespass supposed, J. Bamfield was seised of the said corssett and pike as of his own goods remaining in the plaintiff's house, and that he sold them to the defendant; and thereupon he *tempore quo*, &c., came to the plaintiff's house and demanded them; and the wife of the plaintiff then and there (the plaintiff being absent) licensed him to enter into the house and take them; and he thereupon entered, &c., and took them, as it was lawful for him to do, &c. And upon this it was demurred. And, after divers motions, it was adjudged for the plaintiff that he should recover as to the entering into the house, but not as to the goods; for the goods being in the plaintiff's house, and it not appearing how they came there, viz., either as trespass or otherwise, he cannot of his own head enter; and the wife's license to enter into her husband's house is not good;<sup>1</sup> for she cannot give one authority to enter into her husband's house. But GAWDY, *contra*. For it may be intended the goods were there by the plaintiff's license, and then he might well enter and take them; but the three other judges *contra*. And it was adjudged for the plaintiff. *Vid.* 30 Edw. III. 12.

<sup>1</sup> Grim v. Robinson, 31 Neb. 540 *Contra*. See Holdingshaw v. Ray, Cro. El. 876; Winterbourne v. Morgan, 11 East, 403; Cutler v. Smith, 57 Ill. 251.—Ed.

## CHAPMAN v. THUMBLETHORP.

IN THE QUEEN'S BENCH, TRINITY TERM, 1594.

[Reported in *Croke's Elizabeth*, 329.]

TRESPASS for breaking his close, *et quædam averia ibidem existentia cepit et asportavit*. The defendant pleads that the cattle were his own goods, and that J. S. took them by wrong, and put them in the plaintiff's close by his assent, for which, he finding them there, did take them &c., as it was lawful, &c. And upon this plea it was demurred.

*Pudzey* argued for the plaintiff that the defendant could not enter into the plaintiff's close to fetch them out, except they were put there by the plaintiff's tort; and this plea doth amount to a general issue, for he cannot traverse the property of the goods.

But the court held it a good plea; for the plaintiff by his declaration doth not aver the property of the goods to be in him, but saith only *quædam averia*. And when the defendant's beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place he finds them. And it was adjudged for the plaintiff.<sup>1</sup>

## HIGGINS v. ANDREWS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1618.

[Reported in 2 *Rolle's Abridgment*, 564.<sup>2</sup>]

IF certain persons unknown come into my garden feloniously and tear up certain apple and pear trees, and carry them off to the house of J. S., and the common voice is that the said trees are in the house of J. S., still I cannot justify my entry into the said house to take the said trees, inasmuch as the taking away of these trees annexed to the freehold was not a felony, but only a trespass, and so the case is the same as if they had been taken by a trespasser and put into the said house. Therefore it would not be lawful for me to take them without being a trespasser by my entry. Adjudged on demurrer.<sup>3</sup>

<sup>1</sup> See *Cunningham v. Yeomans*, 7 S. C. R. (N. S. Wales) 149. — Ed.

<sup>2</sup> 2 *Rolle R.* 55 s. c. — Ed.

<sup>3</sup> If goods taken feloniously by A. are put upon the plaintiff's land with the latter's consent, the owner of the goods may lawfully enter and retake them. *Cunningham v. Yeomans*, 7 S. C. R. (N. S. Wales) 149. See also *Toplady v. Stalye*, Sty. 165; *Webb v. Beavan*, 6 M. & G. 1055; *Simpson v. McCaffey*, 13 Oh. 508. — Ed.

## POLLYES CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1620.

[Reported in *Godbolt*, 282.<sup>1</sup>]

IN an action of trespass, it was agreed by the court: If two tenants in common be of lands upon which trees are growing, and one of them felleth the trees and layeth them upon his freehold, if the other entereth into the land and carrieth them away, an action of trespass *quare clausum fregit* lieth against him; because the taking away of the trees by the first was not wrongful, but that which he might well do by law: And yet the other tenant in common might have seized them before they were carried off from the land. But if a man do wrongfully take my goods, as a horse, &c., and putteth the same upon his land, I may enter into his land and seize my horse again; but if he put the goods into his house, in such case I cannot enter into his house and retake my goods; because every man's house is his castle, into which another man may not enter without special license.

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## ANTHONY v. HANEY.

IN THE COMMON PLEAS, JANUARY 25, 1832.

[Reported in 8 *Bingham*, 186.]

TRESPASS. The declaration stated that defendants, on the 8th of November, 1830, and on divers other days, &c., between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon, in the county of Hertford, trampled upon, and consumed plaintiff's grass, then and there placed 5,000 bricks, &c., in and upon the said close, pulled down one barn, three out-houses, and three leantos of plaintiff, and carried away the materials of the said barn, out-houses, and leantos.

Plea: That before and at the said times when, &c., in the said first count mentioned, the defendant John Haney was the owner of and entitled unto a certain barn, three out-houses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of £200, then respectively standing and being in and upon the said close of the said plaintiff, in which, &c.; wherefore the said defendant John Haney, in his own right, and James Haney and Joseph Harding, as the servants of the said John Haney, by his com-

<sup>1</sup> 2 Roll. Ab. 566, pl. 16, s. c. — Ed.

mand, at the said several times when, &c., in the said first count mentioned, entered into and upon the said close in which, &c., in order to pull down, remove, take, and carry away the said barn, out-houses, and leantos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, out-houses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which, &c., doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, &c. Demurrer and joinder.

*Stephen*, Serjt., was to have argued in support of the demurrer, but the court called on

*Bompas*, Serjt., to support the plea.<sup>1</sup>

TINDAL, C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three out-houses, three leantos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, leantos, &c., were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea, which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter.<sup>2</sup> So in the case of a tree which is blown down, or through decay

<sup>1</sup> The argument for the defendant is omitted. — ED.

<sup>2</sup> The owner of a tree may, while standing on his own land, gather the fruit from a branch overhanging his neighbor's premises; and he may justify a battery upon his

falls into the ground of a neighbor, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by Blackstone,<sup>1</sup> who says, "As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife or bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.<sup>2</sup>

*Judgment for plaintiff.*<sup>3</sup>

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### PATRICK v. COLERICK.

IN THE EXCHEQUER, EASTER TERM, 1838.

[Reported in 3 Meeson & Welsby, 483.]

TRESPASS for breaking and entering the plaintiff's close, and with feet in walking, &c., and with horses, &c., and with the wheels of carts, &c., subverting the soil, and seizing and carrying away divers large quantities of straw, &c.

neighbor if the latter use force to prevent him from exercising his right. *Hoffman v. Armstrong*, 48 N. Y. 201, 46 Barb. 337. — Ed.

<sup>1</sup> 3 Comm. 4.

<sup>2</sup> The concurring opinions of PARK, BOSANQUET, and ALDERSON, JJ., are omitted. — Ed.

<sup>3</sup> *Reed v. Smith*, Berton (N. B.) 173, (2d ed.) 288; *Zimmler v. Manning*, 2 S. C. R. C. L. (New South Wales) 235; *Herndon v. Bartlett*, 4 Porter, 481; *Bolling v. Whittle*, 37 Ala. 35; *Cutler v. Smith*, 57 Ill. 252; *Crocker v. Carson*, 33 Me. 436; *McLeod v. Jones*, 105 Mass. 403; *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Newkirk v. Sabler*, 9 Barb. 652; *Blount v. Mitchell*, 1 Tay. (N. Car.) 131; *Chambers v. Bedell*, 2 Watts & S. 225; *Salisbury v. Green*, (R. I. 1892) 24 Atl. R. 787; *Roach v. Damron*, 2 Humph. 425 *Accord*.

*Richardson v. Anthony*, 12 Vt. 273; *Yale v. Seely*, 15 Vt. 221 *Contra*.

Compare *Kallock v. Perry*, 61 Me. 273; *Carpenter v. Halsey*, 60 Barb. 45. — Ed.

The defendant, in his third plea, alleged that the plaintiff had wrongfully taken the said straw from the defendant's possession and placed it upon the plaintiff's close; that the defendant made fresh pursuit after his straw, and then quietly and peaceably entered the said close, and with horses and wagons, in order to retake his said straw, and did then and there quietly and peaceably retake his said straw, and load the same upon the last-mentioned wagons, and carry the same away from and out of the said close in the said first count mentioned, in which, &c., as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff.

Demurrer, and joinder in demurrer.

*F. V. Lee*, in support of the demurrer.<sup>1</sup>

PARKE, B. The passage in Blackstone, as to the right of recaption, applies to the case where the goods are placed on the ground of a third party. All the old authorities say, that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many authorities to that effect in Viner's Abridgment. Thus, in title Trespass, (1) a, it is said, "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgment of the Court of Common Pleas is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shown that they came there by the plaintiff's act.

LORD ABINGER, C. B., BOLLAND, B., and ALDERSON, B., concurred.

*Judgment for the defendant.*<sup>2</sup>

<sup>1</sup> The argument for the plaintiff is omitted. — ED.

<sup>2</sup> Y. B. 21 Hen. VI., fol. 30, pl. 15; Anon. Clayt. 64, pl. 111; Chase v. Jefferson, 1 Houst. 257; Wheelden v. Lowell, 50 Me. 499; Grim v. Robinson, 31 Neb. 540 (*semble*); Chambers v. Bedell, 2 Watts & S. 225; Graham v. Green, 5 All. (N. B.) 330; Murray v. McNeil, 1 W. N. (N. S. Wales) 136 *Accord*. — ED.

SECTION VI. (*continued*).

(f) PRESERVATION OF LIFE, HEALTH, OR PROPERTY OF OTHERS.

## FLETCHER v. FLETCHER.

IN THE QUEEN'S BENCH, JANUARY 18, 1859.

[Reported in 28 *Law Journal Reports*, *Queen's Bench*, 134.]

DECLARATION for assaulting the plaintiff and giving him into custody, and causing him to be imprisoned for a long time in a lunatic asylum.

Fourth plea: that, before and at the time of the alleged imprisonment, the plaintiff had conducted himself as a person of unsound mind and incompetent to take and incapable of taking care of himself, and as a person proper to be taken charge of and detained under due care and treatment, and two medical certificates had been given by persons duly authorized in that behalf, and according to the provisions of the statute for the regulation of the care and treatment of lunatics, whereby it was certified that they had separately and personally examined the plaintiff, and that the plaintiff was a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment; and the defendant had notice of the said several premises and certificates, and had reasonable and probable grounds for believing, and did in fact verily and *bona fide* believe, such certificates to be true, and that the plaintiff was a person of unsound mind and incompetent and incapable to take care of himself, and a person proper to be taken charge of and detained under due care and treatment as such, and that it was unfit and dangerous that he should be at large, and that it was necessary and proper for the plaintiff to be confined; and the defendant, being the uncle of the plaintiff, and a proper person to cause him to be taken in charge of and detained under care and treatment in that behalf, did, for the causes aforesaid, cause the plaintiff to be taken charge of and detained under due care and treatment as a person of unsound mind and incapable of taking charge of himself, and as a person proper to be taken charge of and detained according to the provisions of the statute.

Demurrer.

*Lush*, in support of the demurrer.

*Bovill*, contra.<sup>1</sup>

LORD CAMPBELL, C. J. It is clear that, on this plea, we are bound to give judgment for the plaintiff. My brother Crompton informs us that when the plea was before him at Chambers he had great doubts about the propriety of giving the defendant leave to plead it; but it is as well that such a matter, though perhaps clear, should be judicially

<sup>1</sup> The arguments of counsel are omitted. — Ed.



decided. By the common law of England it is only a person of unsound mind and dangerous to himself or others that may be restrained of his liberty by another. Such is taken to be law from the case in Bro. Abr. down to the last case on the subject. Mr. Bovill has gravely contended that the plea showed that the plaintiff pretended to be a madman expressly that he might be shut up in an asylum; for that is what his argument amounted to. But no such meaning can be put upon it: it merely states that he acted as a person of unsound mind. Then, shall it be said that the fact of any person acting so as to appear of an unsound mind is to be a justification for another locking him up as a lunatic? It would be most dangerous to the liberty of the subject if such a doctrine were to prevail. *Ira furor brevis est*; and there are many persons of eccentric habits, but still entirely in possession of their faculties, as we know from cases of contested wills, yet they may be said to be of unsound mind; and it would be monstrous to say that, because some persons chose to suppose they were lunatics, they might be locked up as such. The plea goes on to allege that a certificate of two physicians had been obtained. But where is the authority at common law for saying that if one or two men, physicians, if you will, say that another is a lunatic, that will justify a third person in taking him and confining him as a lunatic? On the other hand, the statute, instead of being of any service to the defendant, affords an argument against him; for the protection given by it to persons acting under certain circumstances in pursuance of it in regard to alleged lunatics would be unnecessary if the merely acting as a person of unsound mind would be sufficient to justify another in arresting him; for it shows that the legislature supposed that at common law such person would not be protected.<sup>1</sup>

*Judgment for the plaintiff.*<sup>2</sup>

<sup>1</sup> The concurring opinions of WIGHTMAN, CROMPTON, and HILL, JJ., are omitted. — Ed.

<sup>2</sup> Y. B. Lib. Ass. fol. 98, pl. 56 (*semble*); Y. B. 22, Ed. iv. fol. 45, pl. 10; *Re Oakes*, 8 Law Reporter, 122; *Look v. Dean*, 108 Mass. 116; *Kelleher v. Putnam*, 60 N. H. 30; *Hinchman v. Ritchie*, Bright N. P. 143 *Accord*.

One who properly deprives a dangerous lunatic of his liberty must with all reasonable speed give him in charge of his friends or the proper official. He may not detain him till he becomes harmless, *Colby v. Jackson*, 12 N. H. 526, nor take him to a police-station, unless he knows of no other place. *Paetz v. Dain*, 1 Wils. Sup'r Ct. (Ind.) 148.

To arouse a man from a drunken stupor, and to try to assist him on his journey, as a friendly act, and without negligence, gives no cause of action, even though the drunken man is injured in the course of such assistance. *Hoffman v. Eppers*, 41 Wis. 251. — Ed.

## ANONYMOUS.

— HILARY TERM, 1469.

[Reported in *Year-Book*, 9 Edward IV., folio 23, placitum 41.]

TRESPASS was brought for injury to one's grass ; the defendant said that, by a custom of the county of Kent, whenever enemies came upon the coast, &c., it was lawful for all the men of Kent to come upon the land adjoining the shore, and to make trenches and bulwarks, for the defence and safeguard of the country ; and the defendant said that at the time of the said trespass enemies came, &c., and so justified. *Genney*. And I believe it is common law that a man may come upon my land to defend the kingdom, &c.<sup>1</sup> *Catesby*. No, sir : if it has not been customary, they cannot dig in my land, &c., *quære*, &c.

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## DEWEY v. WHITE AND OTHERS.

AT NISI PRIUS, BEFORE BEST, C. J., FEBRUARY 16, 1827.

[Reported in *Moody & Malkin*, 56.]

THIS was an action of trespass for forcing and throwing a stack of chimneys upon the roof of the plaintiff's house, and damaging and injuring the same.

Pleas, not guilty ; and a justification in substance that the chimneys were part of a house of one J. C., adjoining a highway in the parish of St. Andrew's Holborn, and adjoining to the house of the plaintiff, and near to certain other houses ; and that the house of the said J. C. was then recently damaged and consumed by fire ; and the said chimneys were, by reason of the said fire, in a ruinous and dangerous state, and in great and immediate danger of falling in and upon the said highway, and in and upon the said other houses, and thereby of doing great bodily injury to, and destroying the lives of, His Majesty's subjects passing along the said highway, and inhabiting the said dwelling-houses ; and it thereby became necessary, for the safety of His Majesty's said subjects, immediately to remove the said chimneys ; whereupon the said defendants did remove and throw down the said chimneys, and thereby did unavoidably damage the house of the said plaintiff. Replication, *de injuria*, &c., and issue thereon.

<sup>1</sup> Saltpetre Case, 12 Rep. 12 ; *Respublica v. Sparhawk*, 1 Dall. 357, 363 *Accord*. The destruction of property as a war measure gives the owner no remedy. *Ford v. Surget*, 97 U. S. 594, 46 Miss. 130 ; *United States v. Pacific Co.*, 120 U. S. 227, 233, 234. — ED.

The defendants were firemen belonging to the British Fire Office, and the houses of J. C. and of the defendant adjoined a frequented thoroughfare for foot passengers in Holborn.

Upon the plaintiff's counsel contending that the plea, if made out, was no defence to the action,

BEST, C. J., said, That question is upon the record; but I have no hesitation in declaring my opinion now, that the plea, if made out, is a good answer to the action. In analogy to the doctrine of nuisances, and the cases of captains of ships throwing overboard the cargoes to save the lives of the crews, I think it was the duty and right of these defendants to remove these chimneys, and to prevent their remaining to endanger the lives of His Majesty's subjects.

The trial proceeded, and the defendants obtained a verdict, in which the plaintiff acquiesced.<sup>1</sup>

*Taddy*, Serjt., and *D. Pollock*, for the plaintiff.

*Vaughan*, Serjt., and *Brodrick*, for the defendant.

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## PASCAL SUROCCO AND ANOTHER v. JOHN W. GEARY.

IN THE SUPREME COURT, CALIFORNIA, JANUARY, 1853.

[Reported in 3 *California Reports*, 69.]

MURRAY, Chief Justice, delivered the opinion of the court. HEYDENFELDT, Justice, concurred.<sup>2</sup>

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under

<sup>1</sup> *Fields v. Stokley*, 99 Pa. 306 *Accord.* — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quoad jura privata*."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. See 1st Zabriskie, *American Print Works v. Lawrence*, and the cases there cited.

This principle has been familiarly recognized by the books from the time of the Saltpetre Case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of

saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons; but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The Legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> *Malever v. Spink*, Dy. 36, pl. 40; *Saltpetre Case*, 12 Rep. 13; *Governor v. Meredith*, 4 T. R. 797 (*semble*); *Newcomb v. Tisdale*, 62 Cal. 575; *Bishop v. Mayor*, 7 Ga. 200; *Conwell v. Imrie*, 2 Ind. 35; *Field v. Des Moines*, 39 Iowa, 575; *Taylor v. Plymouth*, 8 Met. 465 (*semble*); *McDonald v. Redwing*, 13 Minn. 38 (*semble*); *American Works v. Lawrence*, 1 Zab. 248, 728, 2 Zab. 9, 590; *Mayor v. Lord*, 17 Wend. 290, 297, 18 Wend. 129; *City Co. v. Corlies*, 21 Wend. 367, 371; *Stone v. Mayor*, 25 Wend. 157, 174; *Russell v. Mayor*, 2 Den. 461; *Respublica v. Sparhawk*, 1 Dall. 357, 363 (*semble*); *Beach v. Trudgain*, 2 Grat. 219; *Harman v. Lynchburg*, 33 Grat. 37 *Accord*.

*Reed v. Bias*, 8 Watts & S. 109 *Contra*. Compare *Barrow v. Page*, 5 Hayw. 97.

“So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house, a city or town, and distressed, and to save my life I set fire on mine own house, which spreadeth and taketh hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing any thing which is against the Commonwealth. But if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable.”—BACON, *Elements*, 32.

The removal of wall-paper infected with small-pox virus from the walls of a house gives no cause of action to the owner of the house. *Seavey v. Preble*, 64 Me. 120.

In *Beckwith v. Sturtevant*, 42 Conn. 158, it was decided that the defendant was not justified in putting a small-pox patient into the plaintiff's vacant house. — ED.

## M. A. H. PROCTOR v. M. M. ADAMS AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1873.

[Reported in 113 Massachusetts Reports, 376.]

TORT, in the nature of trespass *quare clausum*, for entering the plaintiff's close and carrying away a boat.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth \$50, which they found lying there.<sup>1</sup>

The defendants requested the court to rule that, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for \$51, and reported the case to this court.

*E. F. Stone*, for the defendants.

*S. B. Ives, Jr.*, for the plaintiff.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3 Bl. Com. 106. *Chase v. Corcoran*.<sup>2</sup> Neither the finders of the boat, nor the owner of the beach, nor the Commonwealth, had any title to the boat as against its former owner. Body of Liberties, art. 90. \*Anc. Chart. 211; 2 Mass. Col. Rec. 143; St. 1814, c. 170; Rev. Sts. c. 57; Gen. Sts. c. 81; 3 Dane Ab. 134, 136, 138, 144; 2 Kent Com. 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him. *Sutton v. Buck*.<sup>3</sup>

If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. *Barker v. Bates*.<sup>4</sup> *Dunwich v. Sterry*.<sup>5</sup> But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 H. VII. 27, 28, pl. 5; Bro. Ab. Trespass, 213; Vin. Ab. Trespass (H. a. 4), pl. 24 *ad fin.*; (K. a.) pl. 3.

<sup>1</sup> The rest of the statement of facts is omitted. — Ed.

<sup>2</sup> 106 Mass. 286, 288.

<sup>3</sup> 2 Taunt. 302, 312.

<sup>4</sup> 13 Pick. 255.

<sup>5</sup> 1 B. & Ad. 831.

In *Dunwich v. Sterry*,<sup>1</sup> a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own and to put the plaintiffs to proof of their title. In *Barker v. Bates*,<sup>2</sup> upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit.

The defendants are therefore entitled to a new trial.

*New trial ordered.*<sup>3</sup>

## HUGH G. v. WILLIAM T.

IN THE KING'S BENCH, MICHAELMAS TERM, 1442.

[Reported in Year-Book, 21 Henry VI., folio 14, placitum 29]

ONE Hugh G. brought a writ of trespass against W. T. *quare R., filium suum et hæredem apud Tregwozam inventum rapuit et abduxit.*

Yelverton said that he delivered R. to the plaintiff within a fortnight after the supposed trespass, and that before the trespass supposed the plaintiff married Jane, sister of John Trevowith, and they had issue the said R., and then Jane died, Hugh then being out of the county; and because it was openly noised and proclaimed in the county that Hugh was dead, John, as uncle and next friend of R., ordered William, his servant, to go and see R., and if he found R. out of safe custody and badly looked after through default of his nurse, to take him and put him in better custody, to be better looked after; wherefore the said William found R., being one year old, greatly neglected by default of his nurse; and therefore William, as servant of John and by his command, took the said R. as he lawfully might. Judgment, if action &c. *Portington.* We ought to recover on his own showing, for John and William have no more to do with R. during the plaintiff's lifetime, than any stranger in the world.

PASTON, J. If William took the child to take care of him, when he was neglected, and delivered him to his father when he returned, what tort or damage is there? None; for if I find a child in the highway in danger of death, and take him to save him, and deliver him to his father, what tort is in me? None in the world. No more in the case at bar.

FULTHORPE, J. Your case is law. But here there is no lawful cause for William to take R. For suppose the father put him in charge of a nurse, who neglected him, is it lawful for John or William to take him from the nurse? *Non, certe*, for if she neglected the child, the father may have an action against her. . . .

<sup>1</sup> 1 B. & Ad. 831.

<sup>2</sup> 13 Pick. 255.

<sup>3</sup> See *Milman v. Dolwell*, 2 Camp. 578; *Parker v. Barnard*, 135 Mass. 116, 117 — Ed.

FULTHORPE, J. Suppose you put your horse in a close, in which there is a quagmire, if your horse is mired, and is in danger of starving to death, if I pull him out of the mire, and take him home and feed him, and then give him back to you, there is no tort on my part, for you have no damage by my act.

NEWTON, C. J. Fulthorpe is right, and if you put a child in charge of a nurse and I find it on the point of being killed by a dog or a horse, and I take it to save it, and then give it to you, there is no tort on my part. Wherefore we all think the plea good, and the issue well joined.

†

## ANONYMOUS.

IN THE COMMON PLEAS, TRINITY TERM, 1506.

[*Reported in Year-Book, 21 Henry VII., folio 27, placitum 5.*]

IN trespass, when the defendant justified because the corn for which the action, &c., was set apart as tithes, and was in danger of destruction by the cattle in the field, and thereupon the defendant took it to the barn of the plaintiff, who was parson of the vill. And to this plea the parson demurred in law.

*Brudnel.* The plea is not good; for when the corn was set apart and left on the land where it had grown, it was easy to take care of it, and in such case it is not lawful for any one to enter and take it. As where one takes my horse for fear that it will be carried away, this is not justifiable. And if his wife has lost her way and knows not where she is, still one shall not take her to his house unless she is in danger of being destroyed in the night or drowned. So here, although the corn was in the middle of the field, still it was by itself, and easy to take care of, and if any one takes it, I have my action against him. And so the bar is not good.

*Palmes.* We have alleged that it was in danger of destruction; and, had we not taken it, it certainly would have been destroyed, which is a sufficient and reasonable cause for us to justify the taking. As if I see my neighbor's chimney burning, to save the things within, I may justify an entry into the house and the taking of the things within to save them. And so because it is alleged that the goods were in danger, and that we took them to save them for the plaintiff, there is good reason for us to be excused. And so the bar is good.

KINGSMIL, J. When one's goods are taken against his will, the act should be justified as being necessary to the Commonwealth, or else by reason of a condition in law. First, as to the Commonwealth, one may justify the taking of goods from a house to save them, or tear down a house to save others. And so in time of war one may justify an entry upon another's land to make a bulwark in defence of the king



and the realm. And, on the other hand, when one distrains my horse for rent, he is justifiable; and this is because the land was bound by a condition of distress; and so of other conditions. And so in these two ways one may justify the taking of goods against the owner's will. But we are out of these cases here. For we are not in the case of the Commonwealth, nor of the condition. For though it is pleaded that the corn was in danger of destruction, still it was not in such danger but that the party should have his remedy. And if I have cattle *damage fesants*, I cannot justify an entry to drive them back, since I ought first to tender amends; therefore here, when the defendant took the corn, so that it should not be destroyed, still he was not justified. For if it had been destroyed, the plaintiff would have his remedy against the destroyer; and although he took it to the barn of the plaintiff, perhaps he used the barn for another purpose, and so no advantage shall be intended by this for the plaintiff, and so it seems the bar is not good.

REDE, C. J. Although the defendant's intention was good, still the intention is not material, but in felony it is; as where one is shooting at butts and kills a man, it is not felony. And so of a tiler on a house who with a stone kills a man unwittingly, it is no felony. But when one shooting at butts wounds a man unintentionally, he shall be called a trespasser against his will. And where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass. And the same law where my sheep are with other sheep. I can justify the chasing of the others, as well as my own, until I have driven them to a place where I can separate them. And in these cases there is reason, for in the first case one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger; and in the second case, they cannot be separated till they are driven to a pen. And where one justifies an imprisonment for suspicion of felony, one ought to have good grounds of suspicion; or he is not justifiable, as hue and cry; and if the cry is for nothing, then he who raised it shall be punished. So one ought always to have a good justification. As in trespass a license is a good justification. And so it is in evidence when the party has pleaded not guilty, for this excuses one for the entry, taking, or cutting at the time. But to return to the case here: when he took the corn, although it was a good deed with regard to the damage which a stranger's cattle might have caused, still it was not a good deed, nor any manner of justification against the owner, since the latter would have had an action against any one who might have destroyed the corn. As when my cattle are *damage fesants* in another's land, I cannot enter to drive them out; and still it is a good deed to drive them out, lest they do more damage. But it is otherwise when a stranger drives my horse into another's close, where it does damage: in such case I may justify an entry to drive it out, since the damage done was the fault of another. But here the defendant's act was not lawful. And it is not like the case where

things are in danger of destruction, as by water, fire, &c. For then there is a loss without remedy against any one;<sup>1</sup> and so the plea is not good.

FISHER, J., was of the same opinion. *Quod nota.*

### + MOUSE'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1608.

[Reported in 12 Reports, 63 ]

IN an action of trespass brought by Mouse, for a casket and a hundred and thirteen pounds, taken and carried away, the case was: The ferryman of Gravesend took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hogshead of wine and other ponderous things were not cast out for the safeguard of the lives of the men: it was resolved *per totam curiam*, that in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*, to which the defendant pleads all this special matter; and the plaintiff replies, *de injuria sua propria absque tali causa*: and the first day of this term this issue was tried, and it was proved directly that if the things had not been cast out of the barge, the passengers had been drowned; and that *levandi causa* they were ejected, some by one passenger and some by another; and upon this the plaintiff was nonsuit.

It was also resolved, that although the ferryman surcharge the barge yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man; for interest *reipublicæ quod homines conserventur*, 8 Edw. IV. 23, &c.; 12 Hen. VIII. 15; 28 Hen. VIII.; Dyer, 36; plucking down of a house in time of fire, &c., and this *pro bono publico; et conservatio vitæ hominis est bonum publicum*. So if a tempest arise in the sea, *levandi navis causa*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises, &c.<sup>2</sup>

<sup>1</sup> Y. B. 2 Rich. III. fol. 15, pl. 39 *ad finem Accord.*

See also Y. B. 9 Ed. IV. fol. 34 pl. 9, *per* CHOKE, J. — ED.

<sup>2</sup> See Price v. Hartshorn, 44 N. Y. 94; Jarvis v. Pinckney, 3 Hill (S. Ca.), 123. Compare Dabney v. N. E. Co., 14 All. 300. — ED.

## KIRK, EXECUTOR, &amp;c. v. GREGORY AND WIFE.

+ IN THE EXCHEQUER DIVISION, JANUARY 11, 1876.

[Reported in 1. *Exchequer Division*, 55.]

THE first count of the declaration alleged that the female defendant converted to her own use certain jewelry and diamond rings, the property of the plaintiff as executor.

The second count alleged a trespass by the female defendant, of the same goods.

Pleas: 1. Not guilty; 2. That the goods were not the goods of the plaintiff as executor. Issue thereon.

At the trial before *Bramwell*, B., in Middlesex, on the 11th of May, 1875, the following facts were proved. The plaintiff's testator died in July, 1874, in his own house while in a state of delirium tremens. His attendants and others were feasting and drinking in the house. The female defendant, who was the wife of the testator's brother, immediately after the death took out of an unlocked drawer in the room where the testator died some diamond rings and jewelry belonging to the testator, and (as she said) placed them with a watch of the testator's in a box, and put the box into a cupboard in another room for safety. The box and cupboard were unlocked. The plaintiff on being informed, found the watch, but the rings and jewelry were missing, and had never been found.

The learned judge ruled that there was no evidence of a conversion; but — the plaintiff's counsel insisting that he was entitled to a verdict on the count in trespass — left to the jury the question, whether the female defendant had put the things away *bona fide* for the purpose of preserving them? The jury answered the question in the affirmative, and the learned judge thereupon directed the verdict to be entered for the defendants, giving leave to the plaintiff to move to enter the verdict for him for 1s. damages on the count in trespass; the defendants to have liberty to add any plea of justification which the facts would support; neither party to appeal from the decision of the court.

A rule *nisi* having been obtained for a new trial on the ground of misdirection, in that the learned judge ought to have asked the jury not only whether Mrs. Gregory put the rings into the cupboard for their preservation, but also whether it was reasonable for her to do so, and whether it was negligent; or to enter a verdict for the plaintiff for 1s., pursuant to leave reserved, if the court should be of opinion that on the facts proved the plaintiff was entitled to a verdict on the trespass count for nominal damages only.

*Anstie*, for the defendants, showed cause.

*Cave*, Q. C. (*Horace Smith* with him), for the plaintiff.<sup>1</sup>

<sup>1</sup> The arguments of counsel are omitted, as well as the concurring opinions of CLEASBY and AMPHLETT, BB. — ED.

*Anstie*, being invited by the court to elect between a new trial and a verdict for the plaintiff for 1s. damages without a certificate for costs, elected the verdict.

BRAMWELL, B. This rule must be absolute to enter a verdict for the plaintiff for one shilling. If there were a reasonable hope of substantial damages being recovered there ought to be a new trial; but all that Mr. Cave has a right to is, I think, a verdict for a shilling. There has clearly been an asportation which the defendants have to justify. Mr. Anstie, on their behalf, had leave to add any plea he thought fit, provided it was a good plea. Suppose there were a plea to the effect that the owner of the goods was recently dead, the executor was unknown, no one was in charge of the house, that the defendants were near relations of the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. I am inclined to think this would be a good plea.<sup>1</sup> The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewelry in the house of a man just dead. But the whole of the supposed plea was not proved. The jury found that the defendant acted *bona fide*, that is to say, that the articles were removed for their preservation; but it was not proved that the interference was reasonably necessary, that is to say, that the things were in a position to require the interference, and that the interference was reasonably carried out. Mr. Anstie ingeniously argued that the responsibility of a person under circumstances of this kind is really a question of negligence, and not of trespass. I do not think it is. But even if it were, it was not shown that the goods were in jeopardy. The supposed plea has not been proved. As the point now raised by the plaintiff never went to the jury, the defendants would be entitled to a new trial; but as they do not ask for it, the verdict must be entered for the plaintiff for 1s. damages.

*Rule absolute to enter the verdict for 1s.*

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### PUTNAM v PAYNE.

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1816.

[Reported in 13 Johnson, 312.]

IN error, on *certiorari* to a justice's court. The defendant in error brought an action in the court below against the plaintiff in error for killing his dog. It was proved at the trial that the dog was very vicious, and frequently attacked persons passing in the street, in Lansingburgh, where the parties resided. The plaintiff below had frequently

<sup>1</sup> *Brown v. Sullivan*, 22 Ind. 359; *Perkins v. Ladd*, 114 Mass. 420 *Accord*.

See also *Magner v. Ryan*, 19 Mo. 196; *Givens v. Higgins*, 4 McC. 286. — ED.

been notified of the ferocious acts of his dog, and had been requested by the neighbors to kill or confine him. The dog in question had been bitten, a few days before he was killed, by a mad dog. There being a very great alarm in the village of Lansingburgh, on account of mad dogs, the inhabitants petitioned the trustees to pass by-laws for restraining dogs, and killing those that should be found at large; and the trustees accordingly passed a law, declaring it lawful for any person to kill any dog which should be found at large in the village. It was also proved that the plaintiff below called upon the defendant, and informed him that a certain other dog in the village was mad, and requested him to go and shoot it; that the defendant accordingly took his gun for that purpose, and in passing through the village met the plaintiff's dog running loose, and shot him dead. Judgment was given for the plaintiff below.

*Per Curiam.* It is unnecessary in this case to decide whether the act complained of could be justified under the by-law of the corporation.

The defendant was fully justified in killing the dog, under the circumstances of the case, upon common-law principles. The dog was, generally, a dangerous and unruly animal, and his owner knew it; yet he permitted him to run at large, or kept him so negligently that he escaped from his confinement. Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance. The public safety demands this rule. It is little better than mockery to say that a person injured by such an animal might sue for damages, or for penalties.

But, in addition to this, the dog had lately been bitten by a mad dog; this in itself was sufficient to justify any person in killing him, if found running at large. We do not mean to say that this would be allowed as a justification in killing more useful and less dangerous animals, as hogs, &c.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> Russell v. Barrow, 7 Port. (Ala.) 106; Parker v. Mise, 27 Ala. 480, 483; Wolf v. Chalker, 31 Conn. 121, 128; Uhlein v. Cromack, 109 Mass. 273, 275; Nehr v. State, (Neb. 1892) 53 N. W. R. 589; Aldrich v. Wright, 53 N. H. 398, 414; Maxwell v. Palmerton, 21 Wend. 407; Hinckley v. Emerson, 4 Cow. 351; Dunlap v. Snyder, 17 Barb. 561; Boecher v. Lutz, 13 Daly, 28; Dodson v. Mock, 4 Dev. & B. 146; Bowers v. Fitzrandolph, Addis. 215; King v. Kline, 6 Pa. 318, 320; Brown v. Carpenter, 26 Vt. 638 *Accord.* — Ed.

SECTION VI. (*continued*).

## (g) DISCIPLINE.

## ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1481.

[*Reported in Year-Book, 21 Edward IV., folio 6, placitum 1.*]

A MAN brought a writ of trespass for assault and battery. *Townsend* for the defendant says *actionem non*, for we say that the plaintiff, a long time before the trespass, on such a day, &c., by a deed here made, covenanted with defendant at London to be his apprentice in the art of hosier at London, according to the custom in the said city, for two years, being then and now within age. And then he shows the matter, that he was negligent in learning his art, and would not learn his art, wherefore the defendant took him by the hand and with a rod punished him the same day when he supposes the trespass, being his apprentice by the form aforesaid, which is the same assault and battery, &c. *LITTLETON, J.* This is no plea, for it is not lawful for one to whip his apprentice although he does not attend to his art, for you may have a writ of covenant against him.<sup>1</sup> *Quære*, if a school-master may justify, for it is no prejudice to him if the scholar will not receive erudition, &c.

## KING v. FRANKLIN.

AT NISI PRIUS, CORAM WATSON, B., 1858.

[*Reported in 1 Foster & Finlason, 360.*]

ACTION for false imprisonment and placing the plaintiff in irons.

The defendant was captain of, and the plaintiff a passenger in, the *Undaunted*.

The placing in irons having been proved, the defence set up was, that a mutiny was imminent, and a justification of the imprisonment for the prevention of the mutiny.

It appeared that a quarrel had arisen between the captain and some of the passengers respecting the playing of cards in a particular part of

<sup>1</sup> Y. B. 21 Edw. IV., fol. 53, pl. 17; Lib. Int. 591; Commonwealth v. Baird, 1 Ashm. (Pa.) 267 (*semble*) *Contra*.

But a master has no right to inflict corporal punishment upon an ordinary hired servant. Commonwealth v. Baird, 1 Ashm. (Pa.) 267; Cooper v. State, 8 Baxt. (Tenn.) 325; Tinkle v. Dunivant, 16 Lea, 503; 2 Kent, Com. (13th ed.) 261. Compare Newman v. Bennett, 2 Chitty, 195. — ED.

the vessel, and some confusion arose therefrom. In the course of the dispute the plaintiff had said that the ship was a floating hotel, and the captain only the landlord of her. The captain thereupon ordered the plaintiff to be slightly ironed, stating, in his evidence, that there was no cabin in which to confine him.

WATSON, B. (in summing up). The captain has the absolute control over the passengers and crew. The contract with the passenger is to carry, board, and lodge him, and the passenger is to obey all the captain's reasonable orders, in an emergency even to work the ship when necessary. If a passenger misconduct himself at table, the captain may remove him, or may even imprison him for a short period, if imprisonment be necessary for the enforcement of his lawful commands. The rule of law is simple; the power of the captain is limited to the necessity of the case. In the present case the defendant justifies, for "that he had reasonable and probable cause to believe, and did believe, that a mutiny was imminent." To succeed in his defence he must prove the whole of this allegation. It would not be sufficient that he did believe unless he had also reasonable cause for apprehending a mutiny. The defendant appears to have taken great offence at the term "landlord of hotel" being applied to him; but the term is not altogether incorrect, except that in case of misconduct the landlord may remove the guest from the house, but as the captain cannot remove the passenger from the ship, he may, if necessary, and in moderation, imprison him. He certainly would not be justified in imprisoning a person for having called him "the landlord of an hotel."

*Verdict for the plaintiff.*<sup>1</sup>

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## HERITAGE v. DODGE.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1886.

[*Reported in 64 New Hampshire Reports, 291.*]

TRESPASS, for assault and battery. Plea, the general issue, with a brief statement that the defendant was teacher of a public school in which the plaintiff was a scholar, and that the assault and battery complained of was the infliction of reasonable punishment of the plaintiff for disrespectful conduct and violation of the regulations of the school. The evidence tended to show that some of the scholars had a practice of coughing and making noises resembling coughing for the purpose of attracting attention, which disturbed the order and quiet

<sup>1</sup> Cases in 1 Term Rep. 536; *Boyce v. Bayliffe*, 1 Camp. 60; *Aldworth v. Stewart*, 4 F. & F. 957; *Agincourt*, 1 Hagg. C. A. 271; *Leith v. Trott*, 4 Russ. & Geld. 120; *Gardner v. Bibbins*, Bl. & Howl. 356; *Thorne v. White*, 1 Pet. Adm. Dec. 174; *The Stacey Clark*, 54 Fed. Rep. 533 *Accord*.

Compare *Noden v. Johnson*, 16 Q. B. 218; *Broughton v. Jackson*, 18 Q. B. 383. — Ed.

of the school. The defendant requested that the noises be stopped; but the disturbance continued to some extent. At the time of the assault the defendant was repeating the request to the school, when the plaintiff made a noise resembling a cough, which the defendant understood was intended by the plaintiff as an act of contempt and defiance of the teacher's authority, and thereupon the defendant inflicted the punishment complained of.

The plaintiff offered evidence tending to show that a portion of the scholars, including the plaintiff, were affected with a cough known as chin-cough or whooping-cough, and the plaintiff testified that the coughing for which he was punished was involuntary, and not intended as an act of disobedience or of defiance. The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing by reason of a chin-cough, then the defendant was not justified in punishing the plaintiff, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of the school." The court declined to give this instruction, and the plaintiff excepted.

Upon this point the court charged the jury that if the defendant, acting honestly and with reasonable caution and prudence, believed that the act of the plaintiff was intended as an act of disrespect for and contempt of the teacher's authority, and if he had reasonable cause for believing that the noise made by the plaintiff was intentional and for the purpose of showing his defiance of the reasonable requirements of the defendant in the government of the school, then the defendant was justified in inflicting moderate and reasonable punishment upon the plaintiff.

The plaintiff excepted to the foregoing instructions. Verdict for the defendant.

*S. L. Bowers*, for the plaintiff.

*A. S. Wait* and *G. Dodge*, for the defendant.

SMITH, J. The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent,<sup>1</sup> in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment.<sup>2</sup> 1 Blk. Com.

<sup>1</sup> Or guardian, *Stanfield v. State*, 43 Tex. 167. — Ed.

<sup>2</sup> *Keit's Case*, 3 Salk. 47; *Fitzgerald v. Northcote*, 4 F. & F. 656; *Vizard v. Neate*, 65 Law Times, 383; *Cleary v. Booth*, '93, 1 Q. B. 465 (for misconduct on the way home from school); *Sheehan v. Sturges*, 53 Conn. 481; *Cooper v. McJunkin*, 4 Ind. 290; *Danenhofer v. State*, 69 Ind. 295; *Vanvactor v. State*, 113 Ind. 11; *State v. Vanderbilt*, 116 Ind. 113; *State v. Mizner*, 45 Iowa, 248, 50 Iowa, 145; *Patterson v. Nutter*, 78 Me. 509; *Commonwealth v. Randall*, 4 Gray, 36; *Deskins v. Gose*, 85 Mo. 485; *State v. Pendergrass*, 2 Dev. & B. 365; *State v. Alford*, 68 N. Ca. 322; *Commonwealth v. Seed*, 5 Pa. L. J. 78; *Anderson v. State*, 3 Head, 455; *Dowlen v. State*, 14 Tex. Ap. 61; *Bolding v. State*, 23 Tex. Ap. 172; *Lander v. Seaver*, 32 Vt. 114; *Morrow v. Wood*, 35 Wis. 59; *State v. Burton*, 45 Wis. 150 (*semble*); *Muckarsie v. Dickson* (Court of



453; 2 Kent Com. 205; Reeve Dom. Rel. 288, 289, 375. He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with a discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice.<sup>1</sup>

The instructions were correct, and there was no error in the refusal to give those requested.

*Exceptions overruled.*

# CHARLES MICHAELSON *v.* ABEL DENISON AND ANOTHER.

IN THE CIRCUIT COURT, UNITED STATES, DISTRICT OF CONNECTICUT,  
SEPTEMBER, 1808.

[*Reported in 3 Day, 294.*]

ON the trial it appeared that Denison, one of the defendants, was the master of a vessel, and the plaintiff his mariner; and that the beating complained of consisted in the punishment inflicted by the former upon the latter, for disobedience of orders, insolent language, and personal violence.

The plaintiff's counsel contended that the master has no right to inflict corporal punishment for insolent language, nor for disobedience to orders, not relating immediately to the management of the vessel; nor, indeed, for *past* offences of any kind.

LIVINGSTON, J., in summing up, after taking notice of the weapon, which was not dangerous, the mode of punishment, which was not unusual, and the degree, which, however severe, was less than sufficient to reduce the plaintiff to submission, recognized the right of the master, during the voyage, to correct a mariner for disobedience to any reasonable commands, and for insolence, and other offences. The punishment, in its nature, is not limited to confinement, corporal chastisement being often necessary and proper; and, as to its extent, depends upon the circumstances of the case, the aggravation of the offence, or the continuance of the disobedience. This is a salutary authority, and ought to be maintained. Without it, it would be impossible to navigate our vessels.

*Verdict for the defendants.*<sup>2</sup>

Session, 1848), 11 D. 4; Ewart *v.* Brown (Court of Session, 1882), 10 R. 163; Ross *v.* Laurie (Court of Session, 1883), 10 R. 160 *Accord*.

A teacher may detain a pupil after school by way of discipline. Fertich *v.* Mishener, 111 Ind. 472. — ED.

<sup>1</sup> Cooley Const. Lim. 341; Cooley Torts, 171, 172, 288; Lander *v.* Seaver, 32 Vt. 114; State *v.* Pendergrass, 2 Dev. & Bat. 365; Fitzgerald *v.* Northcote, 4 F. & F. 656; Reeve Dom. Rel. 288.

<sup>2</sup> "The rule on this subject is well laid down by Abbott (On Shipping, 125). By the common law, says he, the master has authority over all the mariners on board the

ship, and it is their duty to obey his commands in all lawful matters, relative to the navigation of the ship, and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner. His authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice, or scholar. Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression." — *Per* THOMPSON, C. J., in *Brown v. Howard*, 14 Johns. 123. See to the same effect *Aubery v. James*, 1 Vent. 70; *Lane v. Degberg*, Selw. N. P. (13th ed.) 50; *Watson v. Christie*, 2 B. & P. 224; *Rhodes v. Leach*, 2 Stark. 516; *The Agincourt*, 1 Hagg. 271, 272; *The Lowther Castle*, 1 Hagg. 384; *Aitken v. Bedwell*, M. & M. 68; *Murray v. Montrie*, 6 C. & P. 471; *Lamb v. Burnett*, 1 C. & J. 291; *Aertsen v. Aurora*, Bee, 161; *Saunders v. Buckup*, Bl. & Howl. 264; *Forbes v. Parsons*, Crabbe, 283; *Benton v. Whitney*, Crabbe, 417; *Schelter v. York*, Crabbe, 449; *Cushman v. Ryan*, 1 Story, 91; *Morse v. Jewett* (Mass. 1781), 5 Dane Ab. 563; *Flemming v. Ball*, 1 Bay, 3; *Reakie v. Norrie* (Court of Session, 1842), 5 D. 368 *Accord.* — ED.

SECTION VI. (*continued*).

## (h) ABATEMENT OF NUISANCES.

## ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1469.

[*Reported in Year-Book, 9 Edward IV., folio 34, placitum 10.*]

WRIT of right. CHOKE, J. The main question is, whether the pulling up of the stakes of the pond was lawful; for, if so, the tearing down of the house was lawful, for he says in his plea that he could not have pulled up the stakes without the house falling down.

*Fairfax.* It seems that he shall be put to his action of trespass or nuisance, for he could not enter the freehold of the plaintiff; and, sir, if a man has a sewer running from his place in London to the Thames, and it is stopped up, he cannot break the soil to clear it, but is put to his action.

CHOKE, J. When a man has *damnum et injuriam*, he may punish it by entry or action at his option. As if a man is disseised he may enter or have an assize, &c.; but, sir, our case is different from that, for if a man grants me the right of digging on his land, and of making a ditch from a certain spring to my place so as to put in a pipe to conduct the water, and then the pipe is stopped up or broken so that the water escapes, I cannot dig on his land to repair the pipe, for this right was not granted me; but if he grants me the right of digging, &c., to mend the pipe *toctiens quociens*, &c., then I. And, similarly, if I prescribe to have such a conduit, I ought to prescribe for cleaning and repairing *toctiens quociens*, &c., or else I cannot dig, &c. *Quod fuit negatum* in both cases, for it was said *per curiam* that this was incident to the grant.

LITTLETON, J. It seems that he may well pull up the stakes, for they were erected to his nuisance; and if he had waited to bring an action, his land might have been surrounded, and he would have lost the profits of his mill meanwhile, and it seems to me that the entry upon the plaintiff's land was lawful; to abate the nuisance for the wrong done was the wrong of the plaintiff; as if a man takes my goods and carries them upon his land, I may enter and take them, and the entry is lawful, for they came upon his land by his own wrong; but it is otherwise if I bail goods to a man, for then I cannot justify an entry into his house to take them, for they came there by no wrong, but by the act of us both, &c. And if a man holds an acre of me and another of a stranger, and I come to distrain in the acre held by me, and he, perceiving me, drives the cattle out of the acre held of me into the other, I may justify entering the latter to take the cattle *ut supra*. And, similarly, if a man

negligently suffers his house to burn, I, his neighbor, may pull down his house to avoid the danger of my own house burning.

And if water flows *juxta villam* and is stopped, any one in the vill may tear down the obstruction, &c., or otherwise the whole vill would be surrounded, &c. And if a man wrongfully imprisons me in his house, I may break the windows and hedge to escape, &c., for in all these cases it is the plaintiff's wrong, and so here.

NEEDHAM, J. If a man puts up a house to the nuisance of my house, I may be in my own house or land and pull down his house, and justify this; so in this case the defendant shall not be punished for pulling down the house nor removing the stakes; but as to the entry upon the land, this action is not brought for the entry, &c.; wherefore, &c.; but I think the entry is not lawful, for if I lease land for years, containing mines of tin, iron, lead, stone, or coal, &c., and if I enter and take some tin, &c., for this taking of the tin, &c., the termor ought not to punish me, for he cannot have the tin, &c.: and so it is of great trees; but for the entry and disturbance of the soil he ought to punish me, &c.

DANBY, C. J. If the question is, whether the law gives you trees or tin, and you cannot have them without entry, the entry seems lawful.

NEEDHAM, J. It is the lessor's folly to make such a lease, &c. DANBY, C. J. If he is tenant in dower or curtesy. And, sir, in the case at bar the removal of the stakes seems lawful; for supposing the defendant were tenant for years, he could not have an assize of nuisance; and if he brought trespass he would recover damage for the wrong done before the purchase of the writ, and a nuisance, notwithstanding such suit, would continue; and so it would be mischievous if he could not abate the nuisance. And the opinion of all the judges was, that the destruction of the house was lawful, *quære* as to the entry.

LITTLETON said that DANBY was of opinion that the entry was lawful, &c., wherefore, if a man makes a ditch in his land, by which the flow of water to my mill is diminished, I may refill the ditch with the earth dug up, &c.<sup>1</sup>

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### JAMES v. HAYWARD.

IN THE KING'S BENCH, EASTER TERM.

[Reported in *Croke, Charles*, 184.]

TRESPASS for breaking his close, and pulling up, cutting, and casting down a gate.

The defendant justifies, because the gate was placed cross the highway, and so fixed that the king's subjects could not pass without interruption by reason of the said gate, to the nuisance of the king's subjects;

<sup>1</sup> See Y. B. 8 Ed. IV., fol. 5, pl. 14. — Ed.

and therefore he pulled up, cut, and cast down the said gate to use the said way.

The plaintiff shows, that he set up two posts on each side of the way, and hung the gate upon one of the said posts, for the preservation of the springs of the wood there from cattle, so as the subjects might pass the said way without prejudice or impediment at their pleasure; and traverseth that the gate was so fixed and tied that the king's subjects could not pass without interruption by the gate.

The defendant, upon that plea, demurred.

The first question was, Whether the erecting of a gate cross an highway, which may be opened and shut at the pleasure of passengers, be a common nuisance in itself in the eye of the law? it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

Secondly, Admitting it to be a nuisance, Whether every one may pull up and cast down the said gate at their pleasure.

HYDE, Chief Justice, JONES, and WHITLOCK, for the first, conceived, that the erecting of a gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a nuisance; for it is not so free and easy a passage as if no such inclosure had been; for women and old men are more troubled with opening of gates than they should be if there were none.

But it seemed to me that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles to be nuisances; for it appears that there are many gates in divers highways which have been always allowed; and if it were a nuisance in itself there should not be any gate, for there cannot be any prescription for a nuisance; and the multitude of gates in several ways prove that it never was accounted to be any nuisance; and 2 Edw. 4, pl. 2, the erecting of a gate upon the way is pleaded, and admitted to be lawful enough.

For the second, they held, that admitting it to be a nuisance, although the usual course is to redress it by indictment, yet every person may remove the nuisance; and HYDE, Chief Justice, JONES, and WHITLOCK allowed, that the cutting of the gate was lawful; whereupon judgment was for the defendant. And JONES said, that for ancient gates upon highways, it shall be intended they are by license from the king, and upon a writ of *ad quod damnum* sued out of chancery. But I conceived, that cannot be for a stopping, &c.<sup>1</sup>

<sup>1</sup> Brook v. O'Boyle, 27 Ill. Ap. 384; Wales v. Stetson, 2 Mass. 143; Arundel v. McCulloch, 10 Mass. 70; Shea v. Sixth Av. Co., 62 N. Y. 180; Lancaster Co. v. Rogers, 2 Barr, 114; Selman v. Wolfe, 27 Tex. 68; Godsell v. Fleming, 59 Wis. 52; Larson v. Furlong, 63 Wis. 323 *Accord.*

But if the highway is obstructed by encroachments of both the plaintiff and the defendant, the latter cannot justify the removal of the obstruction created by the plaintiff. He should remove his own encroachment. Williams v. Fink, 18 Wis. 265; Godsell v. Fleming, 59 Wis. 52. — ED.

## JONES v. WILLIAMS.

IN THE EXCHEQUER, JANUARY 28, 1843.

[Reported in 11 Meeson &amp; Welsby, 176.]

THE judgment of the court was now delivered by

PARKE, B.<sup>1</sup> A rule was obtained in this case, by Mr. Erle, for judgment *non obstante veredicto* on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass *quare clausum fregit*, stated, that the defendant, before and at the said time when &c., was possessed of a dwelling house, near the *locus in quo*, and dwelt therein; and that the plaintiff, before and at &c., *injuriously and wrongfully permitted and suffered* large quantities of dirt, filth, manure, compost, and refuse, to be, *remain*, and *accumulate* on the *locus in quo*, by reason whereof divers noxious, offensive, and unwholesome smells, &c., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

The question for us to decide is, whether this plea is bad after verdict; and we are of opinion that it is.

The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or showing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo*, it might be removed by the party injured, without any notice to the plaintiff;<sup>2</sup> and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* after-

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> Penruddock's Case, 5 Rep. 101 (*semble*); Baker's Case, 9 Rep. 53 (*semble*); Rix v. Rosewell, 2 Salk. 459; Raikes v. Townsend, 2 Smith, 9; Lonsdale v. Nelson, 2 B. & C. 302, 311; Great Falls Co. v. Wooster, 15 N. H. 412; Lakin v. Ames, 10 Cush. 19; Estes v. Kelsey, 8 Wend. 555; Smith v. Johnson, 76 Pa. 196 *Accord*. — ED.

wards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*,<sup>1</sup> as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's *dictum* is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case*<sup>2</sup> shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice; for in Jenkins's Sixth Century, case 57 (no doubt referring to *Penruddock's Case*), the law is thus stated:—A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a *quod permittat* for it, *before he makes a request* to C. to abate it, for C. is a stranger to the wrong: it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

LORD ABINGER, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the court concurred.

*Rule absolute.*

<sup>1</sup> 2 B. & C. 302.

<sup>2</sup> 5 Rep. 101.

## JAMES BROWN v. STEPHEN PERKINS AND WIFE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1858.

[Reported in 12 Gray, 89.]

SHAW, C. J.<sup>1</sup> This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.<sup>2</sup>

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for that purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

A great many points were raised in the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *à fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance merely because it is a common nuisance,

<sup>1</sup> This statement of the decision was drawn up by the chief justice to guide the new trial. His death prevented the writing out of a fuller opinion.

<sup>2</sup> Only the opinion of the court is given. — Ed.



though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law.<sup>1</sup> *Lonsdale v. Nelson*; <sup>2</sup> *Mayor &c. of Colchester v. Brooke*; <sup>3</sup> *Gray v. Ayres*; <sup>4</sup> *State v. Paul*.<sup>5</sup>

<sup>1</sup> *Mayor v. Brooke*, 7 Q. B. 376-7; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Black*, 18 Q. B. 870; *Hubbard v. Deming*, 21 Conn. 356; *Clark v. Ice Co.*, 24 Mich. 508; *Hopkins v. Crombie*, 4 N. H. 320; *Amoskeag Co. v. Goodale*, 46 N. H. 56; *Brown v. De Groff*, 50 N. J. 409; *Fort Co. v. Smith*, 30 N. Y. 44 (*semble*); *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561; *Moody v. Supervisors*, 46 Barb. 659; *State v. Parrott*, 71 N. Ca. 311; *Fields v. Stokley*, 99 Pa. 306; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497; *Bowden v. Lewis*, 13 R. I. 189; *Larson v. Furlong*, 50 Wis. 681, 63 Wis. 323, s. c.; *Godsell v. Fleming*, 59 Wis. 52 *Accord*.

*Gunter v. Geary*, 1 Cal. 462; *Burnham v. Hotchkiss*, 14 Conn. 311 (*semble*); *Gates v. Blincoe*, 2 Dana, 158 (*semble*); *Law v. Knowlton*, 26 Me. 128 (*semble*); *Graves v. Shattuck*, 35 N. H. 269 (*semble*); *Hart v. Mayer*, 9 Wend. 571 (*semble*); *Wetmore v. Tracy*, 14 Wend. 250 (*semble*); *Meeker v. Van Rensselaer*, 15 Wend. 397 (*semble*); *Renwick v. Morris*, 7 Hill, 575 (*semble*) *Contra*.

Compare *Gerry v. Ellis*, 1 Cush. 306; *Ely v. Supervisors*, 36 N. Y. 297; *Strickland v. Woolworth*, 3 Th. & C. 286; *Rung v. Schoneberger*, 2 Watts, 23; *Jenkins v. Fowler*, 24 Pa. 308. — Ed.

<sup>2</sup> 2 B. & C. 311, 312, and 3 D. & R. 566, 567.

<sup>3</sup> 7 Ad. & El. N. R. 376, 377.

<sup>4</sup> 7 Dana, 375.

<sup>5</sup> 5 R. I. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside, and a *New trial had.*

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X JONES v. JONES.

IN THE EXCHEQUER, APRIL 29, 1862.

[*Reported in 1 Hurlstone & Coltman, 1.*]

DECLARATION. For that the defendants broke and entered the dwelling-house and land of the plaintiff, situate in the parish of Llandewy Brefi, in the county of Cardigan, and bounded on all sides thereof by certain common or waste lands called "Llandewy Brefi Mountain or Waste," which said dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and then, and whilst the plaintiff was therein, pulled down and destroyed the said dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein; and then by so pulling down the said dwelling-house endangered the lives and hurt and injured the persons of the plaintiff and his family, and ejected and expelled them therefrom, and kept them so expelled for a long space of time; and also then seized and took away, and wrongfully converted to their own use, and destroyed the materials of the said house. And by means of the premises the plaintiff was deprived of the use and possession of his said house and land, and was put to great expense in procuring another house and land, and was and is otherwise injured.

Third plea. As to breaking and entering the dwelling-house and land, and pulling down and destroying the dwelling-house and fixtures therein, and seizing and taking the materials of the said house; that the defendant John Jones, at the time of the alleged trespasses, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed, as of right and without interruption, common of pasture over

the said land, for all their cattle, levant and couchant, upon the said land of the defendant John Jones, at all times of the year, as to the said land appertaining; that the alleged trespass to the said land was in use by the defendant John Jones of the said right of common; and because the said house had been wrongfully erected and then was wrongfully in and upon the said land, so that without pulling down the same the defendant John Jones could not use, or enjoy his said common of pasture in and throughout the said land in so ample and beneficial manner as he otherwise would, might, and ought to have done, the defendant John Jones in his own right, and the other defendants, as his servants and by his command, necessarily and unavoidably committed the alleged trespasses in the introductory part of this plea mentioned in removing the said house, doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the alleged trespasses in the introductory part of this plea mentioned.

Demurrer, and joinder therein.

*Dowdeswell*, in support of the demurrer.

*Hannen*, contra.<sup>1</sup>

*Cur. adv. vult.*

The judgment of the court was now delivered by

CHANNEL, B. The question in this case arises on a demurrer to the third plea, to which the plaintiff has replied as well as demurred. The decision of the question is of no importance to the parties, except as regards the matter of costs. The plea was impeached principally on the authority of *Perry v. Fitzhowe*,<sup>2</sup> which, it was contended by the plaintiff, was precisely in point. One member of the court is of opinion that that case may be distinguished from the present, and that the principle intended to be there laid down may be gathered from the explanation of that case by Lord Denman, C. J., when delivering the judgment of the Court of Exchequer Chamber, in *Harvey v. Bridges*.<sup>3</sup> The majority of the court are, however, of opinion that *Perry v. Fitzhowe* is not distinguishable from the present case. We decline to express any opinion as to whether, if this question had come before us for the first time, we should have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry v. Fitzhowe*; but, seeing that the question is of no importance except as regards costs, we think it better, as the court is not unanimous, to abide by that decision, and leave the defendant, if dissatisfied with it, to take the case to a court of error. Our judgment will therefore be for the plaintiff.

*Judgment for the plaintiff.*<sup>4</sup>

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> 8 Q. B. 757.

<sup>3</sup> 14 M. & W. 437.

<sup>4</sup> *Perry v. Fitzhowe*, 8 Q. B. 757 *Accord*. But if notice is first given to the occupant of the house to depart, and he persists in remaining, the owner of the easement may pull down the house. *Davies v. Williams*, 16 Q. B. 546; *Lane v. Capsey*, '91, 3 Ch. 411.

## BRILL v. FLAGLER.

SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1840.

*[Reported in 23 Wendell, 354.]*

By the Court, NELSON, C. J.<sup>1</sup> The important question in the case, however, is whether the facts set up in the third plea constitute a bar to the action. After a full consideration, I am of opinion they do. The demurrer admits that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and wilfully neglected to confine him, and that defendants, unable to remove the nuisance in any other way, killed him. No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so as he commits no riot in the doing of it. 3 Black. Comm. 5. At another place, p. 215, the learned author defines it to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. The erection of a pig-sty, lime-kiln, privy, smith-forge, tobacco-mill, tallow-furnace, and the like, so near a dwelling-house that the stench incommodes the family, and makes the air unwholesome, are given in the books as pertinent illustrations of the rule whereby the injured party may take the remedy into his own hands. See Viner, tit. Nuisance, G. & W.

In the case of *Street v. Tugwell*,<sup>2</sup> an action was brought for keeping dogs so near the plaintiff's dwelling-house that his family were prevented from sleeping during the night, and were much disturbed in the daytime. There was a verdict for the defendant. On motion for a new trial, Lord Kenyon observed that he knew it was very disagreeable to have such neighbors, and that cases of the kind had been made the subject of investigation in courts of justice. He refused a new trial, but intimated that if the nuisance was continued a new action might be brought. He referred to a case in Peere Williams, 2d vol. p. 268, where the plaintiff's house being so near the church that the five o'clock morning bell disturbed her, she made an agreement with the churchwardens to erect a cupola and clock, in consideration of

<sup>1</sup> Only the opinion of the court upon the third plea is given. — Ed.

<sup>2</sup> Selw. N. P. 13th ed. 1070.

which the five o'clock bell should not be rung. This was deemed a good agreement, and the Chancellor granted an injunction to stay the ringing of the bell. It is worthy of remark that all of the instances to which I have referred, and in respect to which the general principle of law is laid down, are cases of erections or acts of themselves lawful, that is, made or done upon the party's own premises. Even there he must enjoy his property in such a manner as not to injure that of another person. *Sic utere tuo, ut non lædas alienum*. How much more liberally should we indulge the application of the rule, the exercise of this summary remedy, where the nuisance is found upon the premises of the party aggrieved? \* In the case before Lord Kenyon, if the seven pointers had been suffered to remain within the plaintiff's enclosures, it is not to be doubted but that he would have instantly granted a new trial, or that the nuisance might have been abated by the destruction of the animals, if necessary.

Even in England, where the owners of these animals are in some respects peculiarly privileged, both by the common and statute law, a party is frequently justified in destroying the dogs. It has been held that a man may kill a dog to prevent mischief to his beast, even when the dog is in the act of chasing it from his master's enclosure. 6 Bacon, 576. So, also, to prevent dangers to himself. *Id.* The keeper also may kill a dog found in a warren: Cro. Jac. 45; or chasing deer in a park, though he might have been taken alive. 3 Lev. 28.

In the case of *Putnam v. Payne*, it was decided that any person is justified in killing a ferocious and dangerous dog which is permitted to run at large by the owner or escapes through negligence, he having notice of his vicious disposition. See 9 Johns. R. 233.

The case of *Wright v. Ramscot*<sup>1</sup> was trespass for killing a dog. The defendant pleaded that the mastiff ran violently upon a dog of one E. B., and did then and there bite said dog, and that he, as his servant, killed the mastiff that he might do no further mischief. The plaintiff demurred; and it was conceded by Saunders, on the argument, that if the plea had stated that the mastiff could not have been otherwise taken off, it might have justified the killing. The plea under consideration seems to have been drawn with an eye to this case; and if the peace and repose of a man's family is to be regarded in the law as dear to him as the life of a common, though I admit often useful, domestic animal, the authority is direct in support of it. The fact is expressly averred that the dog could not be restrained or prevented from haunting the dwelling-house, and disturbing the family by an incessant barking and howling night and day, by a resort to means less severe than taking his life. This, I admit, is a very material averment, and the party should be held to strict proof. A needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable. Regarding, however, as I do, the facts stated in the plea

<sup>1</sup> 1 Saund. 84.

as presenting a case of serious and intolerable nuisance, of which the owner of the animal occasioning it was fully advised, but wilfully neglected to interfere; if no other reasonable means could effectually remove it short of destruction, I cannot doubt but those used were fully justified, upon established principles of the common law. The act was essential to the free and perfect enjoyment by the defendants of their property, as well as to the protection and comfort of their families.

COWEN, J., concurred.

BRONSON, J. I agree that the judgment should be reversed, because the plea was a good bar to the action, and also because improper evidence was given on the question of damages.

*Judgment reversed, and judgment for plaintiffs in error on demurrer.*<sup>1</sup>

<sup>1</sup> *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 129 *Accord.* — ED.

SECTION VI. (*continued*.)

## (i) MISCELLANEOUS EXCUSES.

## GILBERT v. STONE.

IN THE KING'S BENCH, TRINITY TERM, 1641.

[*Reported in Aleyn, 35.*]

IN trespass for breaking of a house and close, the defendant pleaded that *duodecim homines ignoti modo guerrino armati tantum minabantur ei quod de vitæ suæ amissione dubitabat*; and after *requirebant et compulsabant* the defendant to go with them to the house, *quodque ob timorem minarum et per mandatum et compulsionem dictorum duodecim hominum* he did enter the said house, and returned immediately through the said close, which is the same trespass, &c. And upon demurrer, without argument, it was adjudged no plea; for one cannot justify a trespass upon another for fear, and the defendant hath remedy against those that compelled him; also the manner of the pleading was nought, because he did not show that the way to the house was through the close.<sup>1</sup>

## TAYLOR v. WHITEHEAD.

IN THE KING'S BENCH, JUNE 2, 1781.

[*Reported in 2 Douglas, 745.*]

TRESPASS for breaking and entering the close of the plaintiff, at the parish of Otley, in Yorkshire. The defendant pleaded: 1. The general

<sup>1</sup> *Respublica v. Sparhawk*, 1 Dall. 363, *semble, Contra*.

See Y. B. 37 Hen. VI. fol. 37, pl. 26. "But then it is to be noted, that necessity privilegeth only *quoad jura privata*, for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuseth not: for *privilegium non valet contra Rempublicam*; and as another saith, *Necessitas publica major est quam privata*: for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life. As if in danger of tempest those that are in the ship throw over other men's goods, they are not answerable: but if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot for any danger of tempest justify the throwing of them overboard, for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking, *Necesse est ut eam non ut vivam*." — *Bacon's Elements*, p. 32.

In *Waller v. Parker*, 5 Cold. 476, the plaintiff's cotton was removed by the defendant from the latter's gin-house, and scattered in a field, under threats by Confederate soldiers to burn both cotton and gin-house if he refused to comply with their demand. This duress was held to be an excuse for the conversion of the cotton. — *Ed.*

issue. 3. That the *locus*, &c., lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river wharf; that the defendant had a right of way, by prescription, through and over the lane; and, that, because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, &c., *pass or repass*, he did *necessarily* go out of the said way, as near to the said way as he possibly could, into, through, and over it, &c.

The plaintiff having traversed the right of way laid in the special plea, the cause was tried before Lord Loughborough; and the jury found for the plaintiff on the general issue, and for the defendant on the special plea.

Afterwards, *Fearnly* obtained a rule to show cause, why the plaintiff should not be at liberty to enter up judgment on the issue found for the defendant, notwithstanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

*Lee, Davenport, and Wood*, for the defendant.

*Walker*, Serjeant, for the plaintiff.<sup>1</sup>

LORD MANSFIELD. The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.

WILLES and ASHHURST, Justices, of the same opinion.

BULLER, Justice. If this had been a way of necessity, the question would have required consideration, but it is not so pleaded.<sup>2</sup> It does not appear that the defendant had no other road. There can be no ground for a repleader, for the plea is substantially bad; there is no fact alleged in it which it could serve any purpose to deny, or go to issue upon.

*The rule made absolute.*<sup>3</sup>

<sup>1</sup> The statement of the case has been shortened, and the arguments of counsel are omitted. — Ed.

<sup>2</sup> There is no distinction in the case of a way of necessity. *Williams v. Safford*, 7 Barb. 309. — Ed.

<sup>3</sup> *Bullard v. Harrison*, 4 M. & Sel. 387; *Holmes v. Seeley*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309 *Accord*.

See *Arnold v. Holbrook*, L. R. 8 Q. B. 96 (highway with limited dedication).

But if the owner of land subject to a private way obstructs the way, the owner of the way may go *extra viam*. *Haley v. Colcord*, 59 N. H. 7. — Ed.



## ROBERT CAMPBELL v. ENSIGN RACE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1851.

[Reported in 7 Cushing, 408.]

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the Court of Common Pleas, before Byington, J. The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence in support of his plea.<sup>1</sup>

But the judge ruled, that these facts constituted no defence to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

*W. Porter* and *J. C. Wolcott*, for the defendant.

*I. Sumner*, for the plaintiff.

The opinion was delivered at September term, 1852.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books,<sup>2</sup> and it is fully supported by the adjudged cases. *Henn's Case*; *Absor v. French*,<sup>3</sup> *Young v. Taylor*,<sup>4</sup> *Taylor v. Whitehead*, *Bullard v. Harrison*.<sup>5</sup> Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of *Taylor v. Whitehead*, which he says "is the latest on the point, and settles the law."<sup>6</sup> And so Chancellor Kent states the rule.<sup>7</sup> We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well-settled law. *Holmes v. Seely*,<sup>8</sup> *Williams v. Safford*,<sup>9</sup> *Newkirk v. Sabler*.<sup>10</sup> These authorities

<sup>1</sup> The statement of defendant's evidence and the argument for the plaintiff are omitted. — Ed.

<sup>2</sup> 3 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38.

<sup>3</sup> 2 Show, 28.

<sup>4</sup> 1 Ld. Raym. 725.

<sup>5</sup> 4 M. & S. 387, 393.

<sup>6</sup> Dane Ab. 258.

<sup>7</sup> 3 Kent Com. 424.

<sup>8</sup> 19 Wend. 507.

<sup>9</sup> 7 Barb. 309.

<sup>10</sup> 9 Barb. 652.

would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people

should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway, is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable—of obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides; the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property.<sup>1</sup> *Canning v. Williamstown*,<sup>2</sup> *Harwood v. Lowell*,<sup>3</sup> *Brailey v. Southborough*.<sup>4</sup>

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be

<sup>1</sup> St. 1850, c. 5.

<sup>2</sup> 1 Cush. 451.

<sup>3</sup> 4 Cush. 310.

<sup>4</sup> 6 Cush. 141.

selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the Court of Common Pleas.

*Exceptions sustained.*<sup>1</sup>

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## HAW v. PLANNER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1642.

[Reported in 2 Keble, 124.]

IN trespass the defendant justified as churchwarden that he pulled off the plaintiff's hat, he sitting covered in the church, in time of divine service, on which the plaintiff demurred, because the defendant pleads not guilty to all *preter insultum*, and as to that, that he put off his hat, and gave it him in his hand *que est eadem* and *per Curiam*, this is a good justification; and so to switch boys playing in the churchyard, or any disturbers of the peace in time of divine service, *præter* TWISDEN, who held this an assault, and the churchwarden might as well take him a box on the ear, but there being a request first made by the churchwarden, it is a good justification.

*Judgment pro defendant. Nil capiat per billam.*

<sup>1</sup> Henn's Case, W. Jones, 296; Young v. Waterpark, 1 Ld. Ray. 725; Carey v. Rae, 58 Cal. 159; Holmes v. Seely, 19 Wend. 507, 514; Williams v. Safford, 7 Barb. 309, 311; Newkirk v. Sabler, 9 Barb. 652, 655; Respublica v. Sparhawk, 1 Dall. 357, 363; Morey v. Fitzgerald, 56 Vt. 487 *Accord*.

*A fortiori*, if the obstruction is caused by the adjoining landowner, an entry upon his land is allowed. Absor v. French, 2 Show. 28. See also the analogous cases, Eastern Co. v. Dorling, 5 C. B. N.S. 821; Marshall v. Ulleswater Co., L. R. 7 Q. B. 166. — ED.

## GLEVER v. HYNDE AND OTHERS.

IN THE COMMON BENCH, MICHAELMAS TERM, 1674.

[Reported in 1 *Modern Reports*, 168.]

GLEVER brought an action of trespass, of assault and battery, against Elizabeth Hynde and six others, for that they at York-castle, in the county of York, him, the said plaintiff, with force and arms did assault, beat, and evil-entreat, to his damage of one hundred pounds.

The defendants plead to the *vi et armis*, not guilty; to the assault, beating, and evil-entreating, they say, that at such a place, in the county of Lancaster, one Jackson, a curate, was performing the rites and funeral obsequies, according to the usage of the Church of England, over the body of —, there lying dead, and ready to be buried; and that then and there the plaintiff did maliciously disturb him; that they, the defendants, required him to desist; and because he would not, that they to remove him, and for the preventing of further disturbance, *molliter ei manus imposuerunt, &c., quæ est eadem transgressio; absque hoc* that they were guilty of any assault, &c., within the county of York, or anywhere else *extra comitatum Lancastriæ*. The plaintiff demurs.

*Turner*, for the plaintiff. The defendants do not show that they had any authority to lay hands on the plaintiff; as that they were *constables* or *churchwardens*, or any *officers*; nor do they justify by the authority of any that were. If they had pleaded, that they laid hands on him to carry him before a justice of peace, perhaps it might have altered the case. The plaintiff here, if he be faulty, is liable to ecclesiastical censure; and the statute of 1 Philip & Mary, c. 3, provides a remedy in such cases.

*Jones*, contra. If the statute of Philip & Mary did extend to this case, yet it does not restrain other ways that the law allows to punish the plaintiff, or keep him quiet. Our Saviour himself has given us a precedent; he whipped buyers and sellers out of the Temple; which act of buying and selling was not so great an impiety, as to disturb the worship of God in the very act and exercise of it.

THE COURT. The statute of 1 Philip & Mary concerns preachers only: but there is another Act, made 1 Eliz. c. 2, f. 9, that extends to all men in orders that perform any part of the public service. But neither of these statutes take away the common law. And at the common law, any person there present might have removed the plaintiff; for they were all concerned in the service of God that was then performing; so that the plaintiff in disturbing it, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance.

Whereupon judgment was given for the defendant, *nisi causa, &c.*<sup>1</sup>

<sup>1</sup> See *Reid v. Inglis*, 12 Up. Can. C. P. 191; *Sullivan v. Old Colony Co.*, 148 Mass. 119; *Wall v. Lee*, 34 N. Y. 141. — ED.

## IRELAND v. ELLIOTT.

IN THE SUPREME COURT, IOWA, JANUARY 22, 1858.

[Reported in 5 Iowa Reports, 478.]

THIS action was brought to recover damages for an assault and battery upon the plaintiff by the defendant. The jury rendered a verdict in favor of the defendant, from which the plaintiff appeals.<sup>1</sup>

*C. Ben Darwin*, for the appellant.

No appearance for the appellee.

WOODWARD, J. The plaintiff requested the court to instruct the jury, that: "No amount of words, will justify an assault, or an assault and battery," which the court gave, with the following qualification: "This is so in criminal cases, but if the jury find in this action, that Ireland, by abusive words and threatening conduct, brought the battery on himself, it is a defence." The plaintiff further requested the court to instruct the jury, that: "Words alone, do not constitute such wrongful acts, as to justify an assault and battery," which the court gave, but with this modification: "Unless the words were such as to, (and were so intended and designed,) cause a prudent man to lose his reason for the time, and if the battery was not more excessive than the provocation. In such case, it is a defence in a civil action for damages, provided the plaintiff was the wrong-doer."

The time permits but a brief attention to the question here presented, and in truth, it requires but a word. Provoking and insulting language, constitute a defence to acts of violence, in a civil action, no more than in a criminal prosecution. The farthest that the law has gone, and the farthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language, to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages. Thus far the law has gone and no farther. Language which, in its nature, tends generally to excite the angry passions of men, is admitted in evidence, as an extenuation, but never as a justification or defence, either in a criminal, or civil cause.<sup>2</sup>

The judgment of the District Court is reversed, and the cause is remanded.

<sup>1</sup> The statement of the case is abridged, and a portion of the opinion is omitted. — ED.

<sup>2</sup> *Cushman v. Ryan*, 1 Story, 91; *Suggs v. Anderson*, 12 Ga. 461 (but see, *contra*, *Tucker v. Walters*, 78 Ga. 232); *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Gizler v. Witzel*, 82 Ill. 322; *Scott v. Fleming*, 16 Ill. Ap. 539; *Murray v. Boyne*, 42 Mo. 472; *Keyes v. Devlin*, 3 E. D. Sm. 518; *Anderson v. Marshall*, (Court of Session, 1835) 13 S. 1130 *Accord*. — ED.

## M. C. REESE v. LINDA BARBEE.

IN THE SUPREME COURT, MISSISSIPPI, OCTOBER, 1883.

[Reported in 61 Mississippi Reports, 181.]

CHALMERS, J., delivered the opinion of the court.<sup>1</sup>

This case was heretofore before us and will be found with the facts briefly stated in 60 Miss. 906. The case has here been tried the second time in the court below, and has resulted in a verdict of nine hundred and seventy-six dollars for the plaintiff, from which the defendant appeals. The only assignment of error presented is to the action of the court below in instructing the jury that drunkenness of the defendant at the time of the commission of the assault was no defence against the action for damages, but was "an element aggravating said assault." The addition of the words, "an element aggravating said assault," it is insisted, was erroneous, since as the defendant would have been fully liable for his acts if sober, he could not be more so if drunk. The language of the instruction is to be found in many text-books, but their use in criminal cases is censured, and we think properly so, in *McIntyre v. People*,<sup>2</sup> and other cases. Larceny is larceny, and manslaughter is manslaughter, whether committed by a sober or drunken man, and the one offence cannot be raised to robbery nor the other to murder by the fact of the intoxication of the guilty person. We have found no case adjudicating the point in a civil case except as to actions of slander; as to which the authorities differ,<sup>3</sup> but we think the instruction was certainly correct under the facts of this case. Here a pregnant woman was advanced upon by a drunken man, pointing a drawn pistol at her and threatening to shoot. The terror into which she was thereby thrown was undoubtedly increased, and the disastrous consequences which thereupon ensued perhaps rendered more inevitable, by reason of the intoxicated condition of her assailant, since that condition of itself was well calculated to increase her terror. It was fitting, therefore, that the jury should be told that the intoxication was an aggravation of the tort.<sup>4</sup>

*Judgment affirmed.*<sup>1</sup> Only the opinion of the court is given. — ED.<sup>2</sup> 38 Ill. 514.<sup>3</sup> See Townshend on Slander and Libel, § 249.<sup>4</sup> *Commonwealth v. Malone*, 114 Mass. 295 *Accord.* — ED.

## RUTER v. FOY.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1877.

[Reported in 46 Iowa Reports, 132.]

THE plaintiff avers in her petition that the defendant assaulted and beat her with a pitchfork, whereby she sustained great injuries. Trial by jury. Verdict for plaintiff for \$200. Defendant appeals.

*Scales and Cassidy*, for appellant.

*W. V. Allen*, for appellee.

ADAMS, J. I.<sup>1</sup> The defendant asked an instruction, which is in the following words: "If you find from the evidence that plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." The court refused to give the instruction, and the refusal is assigned as error.

The doctrine of contributory negligence has no application in an action for assault and battery. There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional.

*Affirmed.*<sup>2</sup>

## PARLET v. BOWMAN.

HILARY TERM, 1649.

[Reported in 2 Rolle's Abridgment, 567.]

IN trespass for breaking his house, if the defendant pleads that her daughter was retained in the service of the said plaintiff, and was very ill in the said house while in the service of the plaintiff, and that the defendant, her mother, entered the said house to see her daughter, which is the same trespass; this is not a good justification without the license of the owner of the house, or, at least, without asking permission to see her daughter. Adjudged on demurrer.<sup>3</sup>

<sup>1</sup> Only so much of the case as relates to this point is given. — ED.

<sup>2</sup> *Steinmetz v. Kelly*, 72 Ind. 442; *Whitehead v. Mathaway*, 85 Ind. 85; *Norris v. Casel*, 90 Ind. 143; *Barholt v. Wright*, 45 Ohio St. 177 (*semble*) *Accord.* — ED.

<sup>3</sup> A husband's desire to attend the funeral of his wife in a stranger's house gives him no right to enter the house against the will of the stranger. *Neilson v. Brown*, 13 R. I. 151.

A priest who desires to administer the sacrament of penance to a sick person requesting it, may not on that account justify the use of force in ejecting from the room a person who is lawfully there. *Cooper v. McKenna*, 124 Mass. 284. — ED.



## ASHTON v. JENNINGS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1675.

[Reported in *Freeman*, 393.]

It was held, in an action of battery, that it was no good justification for a justice of peace's wife, that the plaintiff, being a doctor of divinity's wife, did go before her at a funeral, and she did *molliter manus imponere*, to pull her back into her place; for, as WYLDE said, if that should be held a good plea, at every funeral there would be nothing but scuffling for places.<sup>1</sup>

## THE EARL OF ESSEX v. CAPEL.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., 1809.

[Reported in 4 *Campbell's Lives of the Chief Justices* (3d ed.), 225.<sup>2</sup>]

AN action being brought by the Earl of Essex against the Honorable and Reverend Mr. Capel, which charged that the defendant had committed a trespass in breaking and entering his grounds, called Cashibury Park, and with horses and hounds destroying the grass and herbage, and breaking down his fences, the defendant justified, that the fox being a noxious animal and liable to do mischief, he, for the purpose of killing and destroying him, and as the most effectual means of doing so, broke and entered the park with hounds and horses, and hunted the fox. Replication, that his object was — not to destroy the fox, but the amusement and diversion afforded by the chase. After two witnesses had been examined, Lord Ellenborough interrupted the further progress of the cause: —

“This is a contending against all nature and conviction. Can it be supposed that these gentlemen hunted for the purpose of killing vermin, and not for their own diversion? Can the jury be desired to say, upon their oaths, that the defendant was actuated by any other motive than a desire to enjoy the pleasures of the chase? The defendant says that he has not committed the trespass for the sake of the diversion of the chase, but as the only effectual way of killing and destroying the fox. Now, can any man of common sense hesitate in saying that the principal motive was not the killing vermin, but the sport? It is a sport the law of the land will not justify, without the consent of the owner of the land, and I cannot make a new law accommodated to

<sup>1</sup> See *Goodwin v. Avery*, 26 Conn. 585. — ED.<sup>2</sup> *Chitty, Game Laws* (2d ed.), 31 n. (f); *Locke, Game Laws* (5th ed.), 45 s. c. — ED.

the pleasures and amusements of these gentlemen. They may destroy such noxious animals as are injurious to the Commonwealth, but the good of the public must be the governing motive.”<sup>1</sup>

<sup>1</sup> *Hume v. Oldacre*, 1 Stark. 351 ; *Paul v. Summerhayes*, 4 Q. B. D. 9 ; *Glenn v. Kays*, 1 Ill. Ap. 479 *Accord*.

See *Geush v. Mynns*, Cro. Jac. 321, 2 Bulst. 60, Brownl. 224 ; *Millen v. Fandrye*, Poph. 161 ; *Pallant v. Roll*, 2 W. Bl. 900 ; *Gundry v. Feltham*, 1 T. R. 334 ; *McConico v. Singleton*, 2 Mills, C. R. 244 ; *Broughton v. Singleton*, 2 N. & McC. 338 ; *Fripp v. Hassell*, 1 Strob. 175. — Ed.

SECTION VI. (*continued*).

## (j) ARREST WITHOUT WARRANT.

## ANONYMOUS.

MICHAELMAS TERM, 1489 OR 1490.

[*Reported in Year-Book, 5 Henry VII., folio 6, placitum 12.*]

ONE counted in trespass that the defendant, such a day and year, with force and arms, assaulted the plaintiff, and wounded him, and imprisoned him for the space of a day, &c. And the defendant justifies the wounding, because the plaintiff assaulted him the same day and year, in the same place, and the tort that he had was of his own wrong and in his defence. And, as to the imprisonment, he says that he was constable in the said vill, and because the plaintiff assaulted him, and broke the peace, he took him and carried him to jail to preserve the peace. And this was held a good plea by the whole court. *Quod nota* notwithstanding he was the person upon whom the plaintiff would have broken the peace.<sup>1</sup>

## SHARROCK v. HANNEMER.

IN THE COMMON PLEAS, HILARY TERM, 1595.

[*Reported in Croke, Elizabeth, 375.*]

FALSE imprisonment. The defendant justifies, for that he was high constable of the hundred of D., in the county of Salop, and that the plaintiff made an affray upon J. S., and that he came presently after the affray made, and J. S. prayed him that he would take sureties of the peace, because he stood in fear of his life; whereupon he committed the plaintiff to ward there (for that he would not find sureties for the peace), as it was lawful for him to do; and traverseth the imprisonment in any other county; and it was thereupon demurred. First, because a constable cannot take sureties of the peace, unless for an affray committed in his view. Secondly, because the county is not traversable. But as to the second, the court would not hear any argu-

<sup>1</sup> Y. B. 14 Hen. VII., fol. 7, pl. 19; Chune v. Pyot, 1 Roll. R. 237; Spilsbury v. Micklethwaite, 1 Taunt. 146; Levy v. Edwards, 1 C. & P. 40; Leddy v. Crossman, 108 Mass. 237; Davis v. Burgess, 54 Mich. 514; People v. Bartz, 53 Mich. 493; Taaffe v. Kyne, 9 Mo. Ap. 15; Willis v. Warren, 1 Hilt. 590; Taylor v. Strong, 3 Wend. 384; Mosley v. State, 23 Tex. App. 409; Johnston v. Moorman, 80 Va. 131 *Accord.* — Ed.

ment ; for there is no question but it is traversable when the justification is local ; and so it was adjudged in the Queen's Bench, 27 Eliz. Roll. 404, betwixt Dawby and Dawby. But as to the first, ANDERSON, WALMESLEY, and BEAUMOND held that the justification is not good. For Anderson said that a constable may commit one for the breach of the peace in his view, but not if it be done out of his sight ; and he cannot take an obligation for the breach of the peace, if it be not broken in his view ; and an high constable is not such an officer, nor conservator of the peace, whereof the common law takes any notice, for he is not mentioned in any book ; and neither the high nor petit constable can take any man's oath, that he is in fear of his life ; wherefore, &c. WALMESLEY. A petit constable may commit one who hath broken the peace, although it were out of his sight, if he will not find sureties of the peace, upon information that one intends to make a battery, and to disturb the peace ; for by preventing the occasion of the breach of the peace, it shall be well preserved. And although that 10 Edw. IV., 22 Edw. IV. pl. 25, 3 Hen. IV. pl. 9, are, that he may commit one upon view of the breach of the peace, and make him find surety therefor ; yet 44 Edw. III. title Barr. is, that he may do it upon information of the peace broken, or to be broken, or that he comes where the persons are assembled to break it ; for thereby the breach shall be avoided : but he may not take sureties by recognizance entered, because he is not a judge, nor any officer of record, but is elected by matter *in pais*, and therefore may take surety by matter *in fait*, viz., the obligation. But an high constable cannot do so ; for he is not a conservator of the peace by any law, nor find I any authority which mentions him ; and in the North there are not any high constables. But neither high nor petit constable can take an oath of any one, that he is in fear of his life : wherefore, &c. BEAUMOND. ▲ constable and sheriff are conservators of the peace at the common law, and may take surety of the peace by obligation, upon view of the peace broken or tumult made : otherwise not. But they cannot take any man's oath that he is afraid of death ; for he is not a judge, nor officer of record ; which is the reason that an obligation taken by him shall be in his own name, and not in the Queen's name ; and shall be certified at the sessions of peace. But a chief constable cannot do so ; nor are they by the common law, but by custom, and for conformity : wherefore, &c. OWEN. A constable is a conservator of the peace by the common law, and may take sureties of the peace, as well before the peace broken as after, for otherwise it would be too late ; and this authority at the common law yet remains, and that a chief constable may also do it. But, notwithstanding his opinion, for the reasons before expressed, it was adjudged for the plaintiff.

## HANDCOCK v. BAKER.

IN THE COMMON PLEAS, JULY 1, 1800.

[Reported in 2. Bosanquet &amp; Puller, 260.]

TRESPASS for breaking the plaintiff's dwelling-house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause.

Two of the defendants suffered judgment by default, and the other two pleaded, 1st, not guilty, 2dly, that the plaintiff in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing, and that, her life being in great danger, she cried "murder!" and called for assistance; whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife and committing the said felony, endeavoring to enter by the door, and knocked thereat; and because the same was fastened and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house and somewhat break, &c., doing as little damage as possible, and gently laid hands on the plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and, for the same purpose, and also for that of taking and delivering the plaintiff to a constable, to be by him taken before a justice and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and, because he did not nor would so do, but wholly refused, and went into bed there, and remained there at the end of such reasonable time, and would not quit the same although thereto requested, the defendants, for the same purposes as they so kept and detained the plaintiff, as above mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order, for those purposes, to take him therefrom, whereupon the plaintiff assaulted and would have beat the said defendants if they had not defended themselves, which they did; and if any damage happened to the plaintiff, it was occasioned by his own assault; and the defendants, for the purposes in that behalf aforesaid, gently laid hands upon the plaintiff and took him from the bed and out of the dwelling-house along the public streets for a reasonable time, and kept and detained him for a

short and reasonable time for those purposes, till they could find a constable, and, as soon as they could find a constable, delivered him to the constable for the purpose in that behalf aforesaid.

The plaintiff replied *de injuria sua propria*, and, by way of new assignment, pleaded that he sued out his writ and declared as well for the trespasses justified as also for that the defendants, at the times when, &c., beat and ill-treated the plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before Grose, J., at the last spring assizes for Norfolk, when the jury found for the plaintiff on the general issue, and for the defendants on the special justification.

In Easter term last a rule *nisi* was obtained, calling on the defendants to show cause why the judgment for the defendants on the special justification should not be arrested, and a verdict entered for the plaintiff on the general issue, with 1s. damages. The case having stood over till this term,

*Shepherd* and *Williams*, Serjts., now showed cause.

*Sellon* and *Bayley*, Serjts., in support of the rule.<sup>1</sup>

LORD ELDON, C. J. If the reasoning be good that a wife ought to apply for assistance to those courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the defendants as to the subsequent assault and imprisonment which is stated to have taken place in the bedroom. I think, however, that a wife is only bound to apply to those remedies where it is probable that the injury to be apprehended will be prevented by such application. In this case, the plaintiff being about to commit a felony by killing and slaying his wife, the defendants interfered by breaking and entering the house in order to prevent the execution of that intent; and, "for the same purposes," that is, with a view to prevent the plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bedroom, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the plaintiff had changed his purpose, and it is argued that it ought to have been averred that his purpose actually continued; but if the preceding allegation be true, that the defendants entered the bedroom for the same purposes for which they had previously entered the house, the latter allegation was unnecessary, since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the defendants entered the bed-chamber and detained the plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that, under some circumstances, it might be more especially the defendants' duty to interfere in that manner. Suppose

<sup>1</sup> The arguments of counsel are omitted. — ED.

A. endeavored to lay hold of B., who is in pursuit of C. with an intent to kill him, and B. thereupon ceases to pursue, with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of B. would be justified. In this case the jury were competent to consider whether, under all the circumstances of the case, including the presence or absence of the wife, the plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact, the jury have found that the defendants kept and detained the plaintiff after he had gone into the bedroom for the same purposes for which they had kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer that, after verdict, it must be presumed that everything is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the defendants should do what they did.

HEATH, J. I am of the same opinion.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do anything to prevent the perpetration of a felony.<sup>1</sup> In this case it is stated that the plaintiff purposed feloniously to kill and slay his wife, to prevent which the defendants interfered in the manner stated in the plea. The justification has been found by the verdict; and the defendants, therefore, are entitled to the judgment of the court.

*Rule discharged.*

## BOOTH v. HANLEY.

AT NISI PRIUS, CORAM ABBOTT, C. J., JUNE 15, 1826.

[*Reported in 2 Carrington & Payne, 288.*]

ASSAULT and false imprisonment. Plea: General issue. (There were also several justifications, but they were not proved.)

The defendant Hanley was a police officer; and it appeared that at about half-past ten o'clock, on the night of the 1st of October, 1825, the plaintiff was in Paul Street, Finsbury, and that he was turning to the wall for a particular occasion, when a watchman came up to him and collared him; and on this, a scuffle ensuing between the plaintiff and the watchman, the defendant Hanley came up, and (with the other

<sup>1</sup> Y. B. 2 Ed. IV. fol. 8, pl. 20; Y. B. 9 Ed. IV. fol. 26, pl. 36; *Maleverer v. Spinks*, Dy. 36 *b Accord.* — Ed.

defendants) took the plaintiff to the watch-house of St. Leonard, Shoreditch, where he was locked up.

ABBOTT, C. J. (in summing up the case to the jury). The watchman certainly had no right to go up to a man and collar him for that which the plaintiff appears to have been doing. He might have gone up to him and remonstrated with him, or have asked him to go somewhere else; but he clearly had no right to assault him for that.

*Verdict for the plaintiff. Damages, £20.*<sup>1</sup>

### TIMOTHY v. SIMPSON.

IN THE EXCHEQUER, HILARY TERM, 1835.

[*Reported in 1 Crompton, Meeson, & Roscoe, 757.*]

PARKE, B., now delivered the judgment of the court.<sup>2</sup> This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity term last at Guildhall. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuria sua propria absque tali causa*. On the trial the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my brothers, Bolland, Alderson, Gurney, and myself last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it denoting a low price, sent his companion in to buy it; the shopman refused, and

<sup>1</sup> See also *Hardy v. Murphy*, 1 Esp. 294; *Wooding v. Oxley*, 9 C. & P. 1; *Kurtz v. Moffitt*, 115 U. S. 487 (desertion from army); *Boyleston v. Kerr*, 2 Daly, 220. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.



demanding a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it an "imposition." Some of the shopmen desired him to go out of the shop, in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop-door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on; many persons were there, and others about the street-door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the mean time the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police-station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10 Geo. IV. c. 44, § 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the

affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock v. Hannemer*; but whether he has that power, in order to take before a magistrate that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power. 2 Hale's Pleas of the Crown, 89. And the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case referred to in 2 East's Pleas of the Crown, 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Camp. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abr. Faux Impt. 6, which is referred to and adopted by Lord Coke in 2d Inst. 52; Lord Holt, in *The Queen v. Tooley*,<sup>1</sup> expresses the same opinion. Lord Chief Justice Eyre, in the case of *Coupey v. Henley*,<sup>2</sup> does the same. And many of the modern text-books state that to be the law. Burn's Justice (26th ed.), Arrest, 258; Bacon's Abr. D. Trespass, 53; 2 East's Pleas of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, § 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray.<sup>3</sup> It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lombard, in his *Eirenarcha*, chap. 3, p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. VII. c. 1." In Hawk. P. C. book 1, c. 63, § 11, it is said that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the

<sup>1</sup> 2 Ld. Raym. 1301.<sup>2</sup> 1 Esp. 540.<sup>3</sup> *Ingle v. Bell*, 1 M. & W. 516; *Cohen v. Huskisson*, 2 M. & W. 477 *Accord.* — ED.

constable, who may carry them before a justice of the peace in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. Plead. 344, 345, and De Grey, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace-officer.<sup>1</sup> And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, P. C. vol. ii. p. 89. The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police-officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of the fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as, upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace-officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police-officer.

<sup>1</sup> *A fortiori*, a private person may arrest an affrayer, and deliver him to an officer who was a witness of the breach of the peace. *Price v. Seeley*, 10 Cl. & F. 28; *Derecourt v. Corbishley*, 5 E. & B. 188; *Green v. Bartram*, 4 C. & P. 308; *Howell v. Jackson*, 6 C. & P. 723; *Wheeler v. Whiting*, 9 C. & P. 262; *Jordan v. Gibbon*, 3 F. & F. 607.—ED.

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the court in thinking that it was not. The plea was as follows: "And the defendant says that before and at the said time when, &c., the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when, &c., entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king, whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein, whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove all. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment: it is necessary to prove such of the facts alleged as would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff [defendant?] himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof

failed; but, as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion that the plea was substantially proved at the time; probably prevented an application to amend; we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*. *Rule accordingly.*<sup>1</sup>

## REGINA v. WILLIAM WALKER.

CROWN CASES RESERVED, APRIL 29, 1854.

[*Reported in Dearsly, Crown Cases, 358.*]

THE following case was stated by Mr. Justice Cresswell.

Indictment for cutting and wounding Thomas Clarkson, with intent to disable. 2d, with intent to do some grievous bodily harm. 3d, with intent to prevent the lawful apprehension of the prisoner.

Thomas Clarkson was a sergeant in the Lancashire constabulary force, and the prisoner a police constable under him. In the evening of the 3d of January Clarkson went, as was his duty, to the house of the prisoner to see that he was correct in the discharge of his duty. The prisoner had some altercation with him, and Clarkson left the house, the prisoner followed and struck him, and fell when attempting to strike a second time. Clarkson then went away for assistance — returned to the prisoner's house with two police constables. The prisoner was not then at home: they returned again in two hours, and then saw him, and Clarkson told him that he must go with him to the Newton station. The prisoner said he would not stir an inch that night. Clarkson attempted to take hold of him, whereupon the prisoner struck him on the head with a clock weight and inflicted a severe wound. The jury found him guilty of wounding to prevent his lawful apprehension, and negatived the other intents charged. Having some doubt whether the apprehension was lawful I did not pass sentence, and have to request the opinion of this court as to the propriety of the conviction. The prisoner could not find bail and remained in custody.

C. CRESSWELL.

<sup>1</sup> *Cook v. Nethercote*, 6 C. & P. 741; *Webster v. Watts*, 11 Q. B. 311; *Price v. Seeley*, 10 Cl. & Fin. 28; *Derecourt v. Corbishley*, 5 E. & B. 188; *O'Kelly v. Harvey*, L. R. 14 Ir. 105; *Hayes v. Mitchell*, 80 Ala. 185; *Quinn v. Heisel*, 40 Mich. 576, 578-79; *State v. Lewis* (Ohio, 1893), 33 N. E. R. 405. *Accord.* — *Ed.*

On the 29th April, 1854, this case was considered by POLLOCK, C. B., PARKE, B., CRESSWELL, J., ERLE, J., and CROMPTON, J. No counsel appeared either for the Crown or for the prisoner.

POLLOCK, C. B. We are all of opinion that this conviction cannot be sustained. The jury have found the prisoner guilty upon the third count of the indictment which charges that the prisoner committed the assault with intent to prevent his lawful apprehension. We are of opinion that the apprehension was not lawful. The assault for which the prisoner might have been apprehended was committed at another time and at another place; there was no continued pursuit of the prisoner, and the interference of the prosecutor was not for the purpose of preventing an affray, nor of arresting a person whom he had seen committing an assault. The apprehension, therefore, not being lawful it follows that the prisoner could not be convicted of an assault with intent to resist his lawful apprehension.

PARKE, B. On the authority of *Timothy v. Simpson*, the officer might arrest if there was danger of an affray being renewed, but that cannot be said to have been so in the present case.

CRESSWELL, J., ERLE, J., and CROMPTON, J., concurred.

*Conviction quashed.*<sup>1</sup>

## SAMUEL v. PAYNE.

IN THE KING'S BENCH, APRIL 21, 1780.

[Reported in 1 *Douglas*, 359.]

ACTION of trespass and false imprisonment against Payne, a constable, and two others. The facts of the case were these: Hall, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search-warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found;

<sup>1</sup> *Reg. v. Gardener*, 1 Moo. C. C. 390; *Wahl v. Walton*, 30 Minn. 506; *Taylor v. Strong*, 3 Wend. 384; *Meyer v. Clark*, 41 N. Y. Sup'r Ct. 107; *State v. Lewis* (Ohio, 1893), 33 N. E. R. 405, 407 *Accord*.

*A fortiori* an officer, who has not seen a breach of the peace, may not after it has ceased, arrest the wrong-doer. *Coupey v. Henley*, 2 Esp. 540; *Queen v. Marsden*, L. R. 1 Cr. Cas. R. 131; *Codd v. Cabe*, 1 Ex. D. 352, 354; *Newton v. Locklin*, 77 Ill. 103 (but see *Main v. McCarty*, 15 Ill. 441); *Pow v. Beckner*, 8 Ind. 475; *Jamison v. Gaernett*, 10 Bush, 221; *Quinn v. Heisel*, 40 Mich. 576; *People v. Haley*, 48 Mich. 495; *McKay's Case*, 5 City H. Rec. 95; *State v. Lewis* (Ohio, 1893), 33 N. E. R. 405.

It necessarily follows that a private person, even though a witness of a breach of the peace, may not after its termination deliver the wrong-doer into the hands of an officer. *Clifford v. Brandon*, 2 Camp. 358, 370; *Cook v. Nethercote*, 6 C. & P. 744; *Baynes v. Brewster*, 2 Q. B. 375; *Price v. Seeley*, 10 Cl. & F. 23 (*semble*); *Grant v. Moser*, 5 M. & G. 123; *Derecourt v. Corbishley*, 5 E. & B. 188; *Humphries v. Connor*, 17 Ir. C. L. R. 1; *Phillips v. Trull*, 11 Johns. 486; *Sternack v. Brooks*, 7 Daly, 142. — Ed.

however, Payne, Hall, and the other defendant, an assistant of Payne's, arrested the plaintiff, and carried him to the Poultry Compter on a Saturday, when no alderman was sitting, by which means he was detained till Monday, when, after examination, he was discharged. The cause was tried before Lord Mansfield, and a verdict found against all the three defendants. At the trial, his Lordship and the counsel on both sides looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate;<sup>1</sup> but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by anybody. His Lordship therefore left it to the jury to consider whether any felony had been committed. The rule, however, was considered as inconvenient and narrow, because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound, first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge.

On this ground a motion was made for a new trial, and, after cause shown, the court held that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's Case*, in *Clayton*;<sup>2</sup> 2 *Hale's Pleas of the Crown*, 84, 89, 91; and 2 *Hawkins*, B. 2, c. 12, and c. 13.<sup>3</sup>

*The rule made absolute.*<sup>4</sup>

<sup>1</sup> Y. B. 2 Ed. IV. fol. 8, pl. 20; Y. B. 7 Ed. IV. fol. 30, pl. 19; Y. B. 11 Ed. IV. fol. 5, pl. 8; Y. B. 5 H. VII. fol. 4, pl. 10; *Stonehouse v. Elliott*, 6 T. R. 315; *Mure v. Kaye*, 4 Taunt. 34; *Hedges v. Chapman*, 2 Bing. 523; *Hall v. Booth*, 3 Nev. & M. 316; *West v. Baxendale*, 9 C. B. 141; *Rayner v. German*, 1 F. & F. 700; *Wexford v. Smith*, 2 Root, 171; *Long v. State*, 12 Ga. 293; *Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401; *Botts v. Williams*, 17 B. Mon. 687; *Gale v. Hoyt*, (Mass. 1796) 5 Dane Ab. 588; *State v. Holmes*, 48 N. H. 377; *Reuck v. McGregor*, 3 Vroom, 70; *Spencer v. Anness*, 3 Vroom, 100; *Holley v. Mix*, 3 Wend. 350; *Burns v. Erben*, 40 N. Y. 463; *State v. Bryant*, 65 N. Ca. 227; *Wakely v. Hart*, 6 Binn. 316; *Brooks v. Commonwealth*, 61 Pa. 352 *Accord*.

*Guppy v. Brittlebank*, 5 Price, 525 *Contra*.

Compare *Bright v. Patton*, 5 Mackey, 534. — Ed.

<sup>2</sup> Clayt. 44, pl. 76.

<sup>3</sup> The new trial came on before Lord Mansfield at the sittings after this term, when a verdict was found against Hall, and for the other two defendants.

<sup>4</sup> Y. B. 17 Ed. IV. fol. 5, pl. 1; Y. B. 2 Hen. VII. fol. 15, pl. 1; *Ward's Case*, Clayt. 44, pl. 76; *Ledwith v. Catchpole*, Holt, N. P. 483; *Lawrence v. Hedger*, 3 Taunt. 14; *Coupey v. Henley*, 2 Esp. 540; *White v. Taylor*, 4 Esp. 80; *Hobbs v. Branscomb*, 3 Camp. 420; *Isaacs v. Brand*, 2 Stark. 167; *McCloughan v. Clayton*, Holt, 478; *Rose v. Wilson*, 1 Bing. 353; *Cowles v. Dunbar*, 2 C. & P. 567; *Davis v. Russell*, 5 Bing. 354; *Nicholson v. Hardwick*, 5 C. & P. 495; *Allen v. Wright*, 8 C. & P. 526; *Williams v. Crosswell*, 2 C. & K. 428; *Werner v. Commonwealth*, 80 Ky. 387; *Miles v. Weston*, 66 Ill. 361; *Doering v. State*, 49 Ind. 56; *Burke v. Bell*, 36 Me. 317; *Rohan v. Sawin*, 5 Cush. 281; *Bath v. Metcalf*, 125 Mass. 274; *Cochran v. Toher*, 14 Minn. 385; *State v. Grant*, 76 Mo. 236; *Hawley v. Butler*, 54 Barb. 490; *Burns*

## BECKWITH v. PHILBY.

IN THE KING'S BENCH, EASTER TERM, 1827.

[Reported in 6 Barnewall &amp; Cresswell, 635.]

THIS was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff; and keeping and detaining him handcuffed and imprisoned, without reasonable or probable cause, for forty-eight hours, on a false and pretended charge of felony.<sup>1</sup>

LORD TENTERDEN, C. J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury,<sup>2</sup> which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable. *Rule refused.*

*v. Erben*, 40 N. Y. 463; *Brockway v. Crawford*, 3 Jones (N. Ca.), 433; *Neal v. Joyner*, 89 N. Ca. 287; *McCarthy v. De Armit*, 99 Pa. 63; *Eanes v. State*, 6 Humph. 53; *Lewis v. State*, 3 Head, 127 *Accord.* — Ed.

<sup>1</sup> The statement of the case, and the arguments of counsel are omitted. — Ed.

<sup>2</sup> *Isaacs v. Brand*, 2 Stark. 167; *Cowles v. Dunbar*, 2 C. & P. 567; *Nicholson v. Hardwick*, 5 C. & P. 495; *Allen v. Wright*, 8 C. & P. 526; *Williams v. Crosswell*, 2 C. & K. 428; *Rohan v. Sawin*, 5 Cush. 281 (but see *Mitchell v. Wall*, 111 Mass. 492; *Bath v. Metcalf*, 125 Mass. 274) *Accord.* But it seems now to be well settled that the question of reasonable cause is a question of law for the court. *Lawrence v. Hedger*, 3 Taunt. 14; *Mure v. Kaye*, 4 Taunt. 34; *Coupey v. Henley*, 2 Esp. 540; *White v. Taylor*, 4 Esp. 30; *Hobbs v. Branscomb*, 3 Camp. 420; *McCloughan v. Clayton*, Holt, 478; *Guppy v. Brittlebank*, 5 Price, 525; *Rose v. Wilson*, 1 Bing. 353; *Hedges v. Chapman*, 2 Bing. 523; *Davis v. Russell*, 5 Bing. 354; *West v. Baxendale*, 9 C. B. 141; *Broughton v. Jackson*, 18 Q. B. 383; *Perryman v. Lister*, L. R. 4 H. L. 521; *Howard v. Clark*, 20 Q. B. D. 558; *Kindred v. Stitt*, 51 Ill. 401; *Spencer v. Anness*, 3 Vroom, 100; *Hawley v. Butler*, 54 Barb. 490; *Burns v. Erben*, 40 N. Y. 463; *McCarthy v. De Armit*, 99 Pa. 63.

See also *Hogg v. Ward*, 3 H. & N. 417; *Cochran v. Toher*, 14 Minn. 385. — Ed.



## FOX v. GAUNT.

IN THE KING'S BENCH, JUNE 8, 1832.

[Reported in 3 *Barnewall & Adolphus*, 798.]

TRESPASS for an assault and false imprisonment. The defendant pleaded that an evil-disposed person, to the defendant unknown, had obtained goods from him on false pretences; that the plaintiff was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant, having probable cause of suspicion, and believing that the plaintiff was the person who had committed the offence, gave charge of him to a peace-officer, to take and keep him in custody till he should be carried before a justice, to be examined touching the premises, on which occasion the peace-officer, at the defendant's request, did so take him, &c., and brought him before a justice to be examined, &c., and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, &c. Replication: *De injuria*. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1831, the defendant had a verdict on the above special plea. A rule *nisi* was obtained in the following term for judgment *non obstante veredicto*, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

*Hutchinson and Heaton* now showed cause.<sup>1</sup>

LORD TENTERDEN, C. J. The instances in *Hawkins* are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Here the case is only of suspicion. The instances in *Hale* of arrest on suspicion after the fact is over relate to felony. In cases of misdemeanor it is much better that parties should apply to a justice of peace for a warrant than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITLEDALE, PARKE, and TAUNTON, JJ., concurred.

*Rule absolute.*<sup>2</sup>

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> *Rose v. Wilson*, 8 J. B. Moore, 362; *Welch v. Glenister*, 2 B. & C. 699; *Marsh v. Loader*, 14 C. B. N. S. 535; *Commonwealth v. Carey*, 12 Cush. 246; *Commonwealth v. McLaughlin*, 12 Cush. 615; *Ross v. Leggett*, 61 Mich. 445; *Pinkerton v. Verberg*, 78 Mich. 573; *Danovan v. Jones*, 36 N. H. 246; *Thomas v. Turck*, 94 N. Y. 90; *People v. Pratt*, 22 Hun, 300 *Accord*.

*Smith v. Donnelly*, 66 Ill. 464 *Contra*. — Ed.

An arrest without warrant is not unconstitutional. *Rohan v. Sawin*, 5 Cush. 281, 285; *Mayo v. Wilson*, 1 N. H. 55-56, 60.

It is not material that there was time to obtain a warrant. *Davis v. Russell*, 5 Bing. 354; *Rohan v. Sawin*, 5 Cush. 281, 285-6; *Holley v. Mix*, 3 Wend. 350. — Ed.

SECTION VI. (*continued.*)(k) JUSTIFICATION BY OFFICER UNDER JUDICIAL PROCESS. <sup>3</sup>

ALBERT CHASE v. ORREN M. INGALLS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1867.

[Reported in 97 Massachusetts Reports, 524.]

TORT; against Ingalls, as a deputy-sheriff for Bristol, for an alleged illegal arrest of the plaintiff.

WELLS, J.<sup>1</sup> The execution, upon which the plaintiff was arrested and committed, was regular in form, and bore the affidavit and certificate of a magistrate as provided by the Gen. Sts. c. 124, § 5. *Primâ facie*, it is a complete defence to the officers acting in accordance with its directions. The defect relied on by the plaintiff to deprive them of its protection is the fact, now admitted, that the magistrate who made the certificate was the attorney of record of the party in whose favor the execution issued.

It is settled law that an officer is protected by his precept, if the court or magistrate had authority such as the precept assumes. It is not his duty to inquire into the particular facts of the case, if the general power appear and the process be regular. He cannot be affected by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer. Even if the defect be one which renders the precept void in its operation between the parties, or for the transfer of property, yet it will not subject the officer to liability as a trespasser. See *Sandford v. Nichols*,<sup>2</sup> and cases cited to this point by the defendants.

The cases relied upon by the plaintiff do not support any doctrine inconsistent with this. The decision in *Pierce v. Atwood*<sup>3</sup> is put expressly upon the ground that the want of authority in the magistrate appeared from the warrant itself. In *Fisher v. McGirr*,<sup>4</sup> the want of jurisdiction arose from the very character of the proceeding, which the warrant disclosed. In *Piper v. Pearson*,<sup>5</sup> the officer was held liable because his warrant did not show affirmatively an apparent jurisdiction, there being none in fact, and the burden being upon him to establish his justification.

Where the proceeding is, in its nature, one in which the magistrate has no right to exercise the authority under which the officer assumes

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 13 Mass. 286.

<sup>4</sup> 1 Gray, 45.

<sup>3</sup> 13 Mass. 324, 344.

<sup>5</sup> 2 Gray, 120.

to act, he is held responsible, although acting in good faith; because in such case the want of authority is disclosed upon the face of the precept. But where the want of authority arises from some fact that is personal to the magistrate, or peculiar to the proceedings in the particular case, the precept cannot disclose it, and the officer is not to be held liable without actual knowledge of the fact.

The plaintiff offered no evidence to show that the defendant had actual knowledge that the certifying magistrate was disqualified; not deeming it to be material whether he knew it or not; and the testimony of the defendant, as reported, would not warrant the jury in finding such knowledge. He is not entitled now to have a jury to determine that question.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> *Cotes v. Michill*, 3 Lev. 20; *Moravia v. Sloper*, Willes, 30, 34; *Andrews v. Marris*, 1 Q. B. 3 (explaining *Philips v. Biorn*, 1 Stra. 509; *Smith v. Bouchier*, 2 Stra. 993, and *Morse v. James*, Willes, 122); *Erskine v. Hohnbach*, 14 Wall. 613; *Matthews v. Densmore*, 109 U. S. 216 (reversing s. c. 43 Mich. 461); *Harding v. Woodcock*, 137 U. S. 43; *Babe v. Coyne*, 53 Cal. 261; *Watson v. Watson*, 9 Conn. 140; *Lattin v. Smith*, 1 Ill. 284; *Brotter v. Cannon*, 2 Ill. 200; *Hill v. Figley*, 25 Ill. 156; *State v. Foster*, 10 Iowa, 435; *Banks v. Reynolds*, 3 B. Mon. 80; *Garnet v. Wimp*, 3 B. Mon. 360; *State v. McNally*, 34 Me. 210; *Sandford v. Nichols*, 13 Mass. 286, 288; *Kennedy v. Dunclee*, 1 Gray, 65, 71; *Clark v. May*, 2 Gray, 410; *Chase v. Ingalls*, 97 Mass. 524; *Underwood v. Robinson*, 106 Mass. 296; *Miller v. Horton*, 152 Mass. 540, 551; *Bird v. Perkins*, 33 Mich. 28; *Matthews v. Densmore*, 43 Mich. 461, 463; *Hines v. Chambers*, 29 Minn. 7; *Walden v. Dudley*, 49 Mo. 419; *State v. Weed*, 21 N. H. 262; *Woods v. Davis*, 34 N. H. 328; *Warner v. Shed*, 10 Johns. 138; *Savacool v. Boughton*, 5 Wend. 170; *Lewis v. Palmer*, 6 Wend. 367; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Cornell v. Barnes*, 7 Hill, 35, 36; *Fulton v. Heaton*, 1 Barb. 552; *State v. Curtis*, 1 Hayw. (N. Ca.) 471; *Cody v. Quinn*, 6 Ired. 191; *Gore v. Mastin*, 66 N. Ca. 371; *Harmon v. Gould*, Wright, 709; *Champaign Bank v. Smith*, 7 Oh. St. 42; *Jones v. Hughes*, 5 S. & R. 299; *Foster v. Gault*, 2 McMull. 335; *Mayer v. Duke*, 72 Tex. 445; *Stoddard v. Tarbell*, 20 Vt. 321; *Sprague v. Birchard*, 1 Wis. 457, 465; *Young v. Wise*, 7 Wis. 128; *Bogert v. Phelps*, 14 Wis. 88; *McLean v. Cook*, 23 Wis. 364; *Grace v. Mitchell*, 31 Wis. 533, 539; *Stahl v. O'Malley*, 39 Wis. 328; *Murdock v. Killips*, 65 Wis. 622 *Accord*.

The general rule is open to one exception, the reason of which is not obvious. If an officer, who is sued in trespass by A. for attaching his goods under process against B., justifies on the ground that A. got the goods by a conveyance which was fraudulent and void as against the creditors of B., it is not enough to show that the attachment was issued at the suit of one who was a creditor of B., and was regular on its face; the officer, it is held, must establish the absolute regularity of the process. *Matthews v. Densmore*, 43 Mich. 461 (but see s. c. 109 U. S. 216); *Howard v. Manderfield*, 31 Minn. 337; *Oberfelder v. Kavanagh*, 21 Neb. 483; *Williams v. Eikeuberry*, 25 Neb. 731; *Noble v. Holmes*, 5 Hill, 194; *Van Etten v. Hurst*, 6 Hill, 311. — *Ed.*

## THE PEOPLE v. WARREN.

IN THE SUPREME COURT, NEW YORK, 1843. 6

[Reported in 5 Hill, 440.]

CERTIORARI to the Oneida general sessions, where the defendant was convicted of an assault and battery upon one Johnson, a constable. Johnson arrested the defendant on a warrant issued by the inspectors of election of the city of Utica for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors.<sup>1</sup> The warrant was regular and sufficient upon its face. The defendant resisted the officer, and for that assault he was indicted. The defendant offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election, and *that Johnson knew it*. The court excluded the evidence, and the defendant was convicted. He now moved for a new trial on a bill of exceptions.

*W. Hunt*, for the defendant, said the evidence should have been admitted. It would have shown that the inspectors had no jurisdiction of the subject-matter; and if the officer knew it, his process was no justification of the arrest. *Parker v. Walrod*.<sup>2</sup> But,

PER CURIAM. Although the inspectors had no jurisdiction of the subject-matter, yet as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some *dicta* the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it.<sup>3</sup>

And without hearing *T. Jenkins* (district attorney), who was to have argued for the people, *New trial denied.*

HORTON v. HENDERSHOT. D

IN THE SUPREME COURT, NEW YORK, JANUARY, 1841.

[Reported in 1 Hill, 119.]

TRESPASS *de bonis asportatis*, tried at the Tompkins circuit in February, 1839, before Monell, C. Judge. Both parties are constables, and both sought to make title to the possession of the property, under

<sup>1</sup> 1 R. S. 137, § 37.<sup>2</sup> 16 Wend. 514.<sup>3</sup> *Watson v. Watson*, 9 Conn. 140; *Underwood v. Robinson*, 106 Mass. 296; *O'Shaughnessy v. Baxter*, 121 Mass. 515; *State v. Weed*, 21 N. H. 262; *Webber v. Gay*, 24 Wend. 485 *Accord.* — ED.

several attachments issued by justices of the peace, in favor of several individuals, against one Edwin Dart. The plaintiff made the first levy, and took the property into his possession; and for the subsequent taking by the defendant, this action was brought. All of the attachments were regular upon their face, so as to afford a sufficient protection to the officers who served them; but in relation to the parties in whose favor they issued, all the attachments on both sides were void, because the affidavits on which they issued did not show enough to give the justices who issued them, jurisdiction to proceed in that manner. A verdict having passed for the defendant, the plaintiff now moves for a new trial on a case.

*G. D. Beers*, for plaintiff.

*B. Johnson*, for defendant.

*By the Court*, BRONSON, J. Both of these officers have acted under attachments, which, though void as to the parties in whose favor they issued, were regular upon their face, and without any apparent defect of jurisdiction on the part of the justices who issued them. The plaintiff levied first, and the defendant took the property out of his possession. Can the plaintiff maintain trespass for that taking? The case of *Earl v. Camp*<sup>1</sup> answers the question against him. The rule which justifies the officer, when acting under such process as I have mentioned, is one of protection — not of assault. It is a shield, but not a sword. The officer, when sued, may defend under such process; but he cannot build up a title upon it, which will enable him to maintain actions against third persons.

The defendant, in this case, stands simply in the attitude of defence. He claims nothing but that protection which process, apparently regular, affords to the officer who serves it. The plaintiff goes beyond that, and seeks to build up a title upon the process in his hands. He has not been sued, nor is he in any peril of suffering damage. If Dart sues him, the process will be a sufficient defence. If the plaintiffs in the process sue, because the property has been lost, the officer may answer, that their process was void. *Earl v. Camp*.<sup>1</sup> In short, the plaintiff is not acting on the defensive, but is suing for the benefit of persons who could not maintain actions in their own names.

The fact that the defendant was indemnified by the persons under whose process he acted, cannot alter the case. Taking an indemnity, does not deprive the officer of the protection which his process affords.

The case was put upon other grounds at the circuit; but as the one I have mentioned leads to the same result, there can be no use in granting a new trial. This is a *case* — not a bill of exceptions.

*New trial denied.*<sup>2</sup>

<sup>1</sup> 16 Wend. 562.

<sup>2</sup> In *Clearwater v. Brill*, 4 Hun, 728, the first officer, under similar circumstances, prevailed against the second. *Earl v. Camp*, 16 Wend. 562, was distinguished, on the ground that in that case the first officer was not in possession when the second officer levied. The distinction seems not to have been regarded in the principal case. In *Parker v. Walrod*, 16 Wend. 514, the plaintiff was in possession, and succeeded. — ED.

## CAMPBELL v. SHERMAN.

IN THE SUPREME COURT, WISCONSIN, JUNE TERM, 1874.

[Reported in 35 Wisconsin Reports, 103.]

APPEAL from the Circuit Court for Eau Claire County.

Action for the unlawful seizure and conversion by the defendant, sheriff of Eau Claire County, through his deputy, and under color of his office, of his steamboat with its tackle and furniture, the property of the plaintiff. The complaint demands damages for the value of the property, and for the loss caused plaintiff in his business by the seizure.<sup>1</sup>

COLE, J. The able and ingenious counsel for the defendant did not seriously contend that ch. 184, Laws of 1869, so far as it attempted to authorize a proceeding *in rem* against a vessel for the enforcement of a maritime contract, could be sustained as a valid enactment. The decisions of the Supreme Court of the United States are too clear and emphatic upon that question to allow any discussion, unless their binding authority is denied — a position not assumed in the argument. See *The Moses Taylor*; <sup>2</sup> *Hine v. Trevor*; <sup>3</sup> *The Belfast*; <sup>4</sup> *The Eagle*.<sup>5</sup> Also see decisions in the State courts in the following cases: *In re Steamboat Josephine*; <sup>6</sup> *Brookman v. Hamill*; <sup>7</sup> *Vose v. Cockcroft*; <sup>8</sup> *The Steamboat General Buell v. Long*; <sup>9</sup> *Thorsen v. The Schooner J. B. Martin*.<sup>10</sup> In view of these various adjudications, it is idle to argue in favor of the proposition that the State Legislature has authority to create maritime liens, or the power to confer upon a State court jurisdiction to enforce such a lien by a proceeding *in rem* against the vessel according to the practice in admiralty. That a proceeding against a vessel to enforce a contract for pilot's wages is a subject of admiralty jurisdiction, and partakes of all the incidents of a suit in admiralty, is equally well settled. It therefore results from these propositions of law, that the Circuit Court which issued the warrant commanding the sheriff to seize and safely keep the steamer *Ida Campbell* to answer any lien which should be established against the boat in favor of the plaintiff in that action for pilot's wages, had no jurisdiction of the cause, and its process was void. It gives no strength to the position of defendant's counsel, nor does it aid the discussion, to say that the Circuit Court is a court of general jurisdiction, when it is conceded that it had no jurisdiction over a proceeding exclusively vested in the courts of the United States. For as to the subject-matter of such a suit, it had no jurisdiction whatever, and the Act of the Legislature clothed the

<sup>1</sup> The rest of the statement of facts and the arguments of counsel are omitted.

— ED.

<sup>2</sup> 4 Wall. 411.

<sup>3</sup> 4 Wall. 555.

<sup>4</sup> 7 Wall. 624.

<sup>5</sup> 8 Wall. 15.

<sup>6</sup> 39 N. Y. 19.

<sup>7</sup> 43 N. Y. 554.

<sup>8</sup> 44 N. Y. 415.

<sup>9</sup> 18 Ohio St. 521.

<sup>10</sup> 26 Wis. 488.

court with no power to try and determine it. The party might, of course, have brought his action in the Circuit Court to enforce a common law remedy ; but when he resorted to it to enforce a maritime lien by a proceeding *in rem*, the court had no jurisdiction of the cause.

This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause. Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair upon its face, shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court has exceeded its jurisdiction. The rule is stated by Mr. Justice Smith in *Bagnall v. Ableman*,<sup>1</sup> in the following language : "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular upon its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution," p. 179. The form of the warrant issued in the present case is not set forth in the answer. But it was undoubtedly such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184. It would command the officer to attach and seize the steamer *Ida Campbell*, her tackle, apparel and furniture, if found within his county, and safely keep the same to answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recital showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We must presume from the matters stated in the answer, that such was the form of the warrant under which the officer acted ; and furthermore a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien. In other words, it would show that the Circuit Court had no jurisdiction of the subject-matter of the action, and no power to hear and determine it. And we understand the rule to be, that where the process does thus show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present

<sup>1</sup> 4 Wis. 163.

case the duty of determining, in advance of any decision of the courts of this State, the validity of an Act of the Legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *Ignorantia juris non excusat* — ignorance of the law, which every man is presumed to know, does not afford excuse — in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without an exception, that this does not excuse. It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an Act of the Legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.

We have examined the authorities cited on the brief of counsel for the defendant, but we find nothing in them inconsistent with the views above expressed.

The conclusion which we have reached is, that the answer does not state a defence to the action, and that the demurrer to it should have been sustained.

BY THE COURT. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.<sup>1</sup>

<sup>1</sup> *Turner v. Felgate*, 1 Lev. 95; *Entick v. Carrington*, 2 Wils. 275, 19 How. St. Tr. 1029 s. c.; *Wise v. Withers*, 3 Cranch, 331; *Grumon v. Raymond*, 1 Conn. 40; *Sumner v. Beeler*, 50 Ind. 341; *Campbell v. Webb*, 11 Md. 471; *Sandford v. Nichols*, 13 Mass. 286; *Pearce v. Atwood*, 13 Mass. 324; *Fisher v. McGirr*, 1 Gray, 1, 44; *Merritt v. St. Paul*, 11 Minn. 223; *Savacool v. Broughton*, 5 Wend. 170, 172; *Sprague v. Birchard*, 1 Wis. 457; *Bagnall v. Ableman*, 4 Wis. 163 *Accord.* — *Ed.*



## SOPHIA LASHUS v. GEORGE H. MATTHEWS.

IN THE SUPREME JUDICIAL COURT, MAINE, DECEMBER 6, 1883.

[Reported in 75 Maine Reports, 446.]

BARROWS, J.<sup>1</sup> The plaintiff Sophia, wife of Levi Lashus, brought this action of trespass against the defendant, a deputy sheriff in the county of Kennebec, basing her claim to recover on the ground that he had attached and carried away a small stock of goods and the furniture in a certain saloon as the property of her husband, Levi Lashus, when in fact the same belonged to her. The case was tried at the October term, 1882, and the defendant, among other matters, put in evidence a writ in a suit then still pending in the Superior Court, in favor of Mark Rollins v. Levi Lashus, being the same on which he had attached the property in controversy, and the note on which said Rollins' suit was founded, given in 1871 by Levi to said Rollins' predecessor in the office of county treasurer. The plaintiff produced a bill of sale from her husband of the stock and fixtures which were in the shop in March, 1876, purporting to be "in consideration that my wife, Sophia Lashus, has this day become responsible for certain of my debts by signing notes with me, and securing payment of the same by mortgage of real estate."

Looking at all that was in evidence, and all that was conspicuously lacking on her part, if the jury came to the conclusion that this property and business really belonged to the husband, who supported himself and his wife out of it, and had what money he wanted to spend himself—and that it did *not* belong to the wife, who knew and did so little that was material in relation to it, we are by no means sure that they erred.

They are not wont to err on that side in such cases.

The motion to set aside the verdict as against law and evidence, cannot be sustained.

But since the trial, and while the case was pending on the motion to set aside the verdict which is disposed of as above, comes the plaintiff with another motion to set aside the verdict for newly discovered evidence, the substance of which is that judgment has been rendered in favor of Levi Lashus in the suit brought by the county treasurer against him, in which the property here in controversy was attached as the property of Levi. The motion cannot prevail.

The question whether or not an officer serving in good faith and in a proper manner a writ from a court of competent jurisdiction is a trespasser in making an attachment, does not depend upon the result of the suit in which the attachment is made, nor is it affected by it in a case like this. The officer represents not the attaching creditor

<sup>1</sup> Only a portion of the opinion of the court is given. — Ed.

<sup>2</sup> R. S., c. 31, § 22.

alone; but the law, which authorizes him to "attach and hold as security [goods and chattels] to satisfy the judgment for damages and costs which the plaintiff *may* recover."<sup>1</sup>

The validity of the claim sued is not in issue in a suit against the officer for making the attachment, nor can it be thus collaterally tried. The plaintiff here must recover, if at all, upon the facts she alleges and proves to have existed at the time when her action was commenced and tried. The foundation of her claim is that the property was hers and so not liable to attachment for any debt which the defendant in the attachment suit might be found to owe. The process in the officer's hands afforded him a conclusive justification for all regular and lawful proceedings against the defendant therein named, and all who can assert only his rights. Nor does the dissolution of the attachment after the suit against the officer is commenced, make the officer, who has simply obeyed his precept and done his duty under it, liable in such suit. If he attaches property which is not liable to attachment for the debts of the defendant named in the writ, he is responsible to the owner. That was the claim here made, but the jury have settled the vital facts against the claimant. It follows inevitably from the evidence and the finding of the jury, that the property attached by this defendant was subject to be attached and held for such judgment as the county treasurer *might* recover against Levi Lashus; and the failure of the county treasurer's suit does not make the officer a trespasser *ab initio*.

The officer in defending a suit of this sort, is neither expected nor required to come prepared to try out the issue between the parties to the suit in which he has made the attachment. They would be bound by no finding which the jury might make in his case, and if the right of the plaintiff in the attachment suit to recover were an issuable fact in a suit of this description, and the failure of the officer to establish it, would make him liable to a plaintiff occupying the position that this plaintiff does, it might turn out when the attachment suit came on for trial between the parties to it, that the plaintiff there would prevail, and the officer be called upon to respond to him for failing to seize the attached property upon execution. The law does not expose its officer to any such dilemma, nor does it permit any such incongruous mixture of issues between other parties in the trial of a cause. By virtue of the law which empowers him to attach the goods and chattels of the defendant in the writ placed in his hand for service, he acquires a special property in the goods attached, and the right to contest all claims thereto asserted by any third parties unembarrassed by any question as to the maintenance of the suit in which the attachment is made.

*Motions overruled. Judgment on the verdict.*<sup>2</sup>

<sup>1</sup> R. S. c. 81, § 22.

<sup>2</sup> *Livingston v. Smith*, 5 Pet. 90; *Kirksey v. Dubose*, 19 Ala. 43, 51; *Walker v. Woods*, 15 Cal. 66; *Jackson v. Kimball*, 121 Mass. 204, 206; *Grady v. Bowe*, 11 Daly, 259; *Rice v. Miller*, 70 Tex. 613 *Acord*.

See *Hall v. Stryker*, 27 N. Y. 591. — Ed.

## STATE v. J. DOWNER AND A. FULLER.

IN THE SUPREME COURT, VERMONT, MARCH, 1836.

[Reported in 8 Vermont Reports, 424.]

THIS was an indictment against the respondents for resisting an officer in the execution of his office. Plea — not guilty. The defendants offered to show that the officer under an attachment against a third person was attempting to seize the goods of the defendant Downer. This evidence was excluded.<sup>1</sup>

The opinion of the court was delivered by

REDFIELD, J. We think the testimony offered by the defendants was properly rejected by the county court. It is well settled that one may defend the possession of his property against a stranger with such force as may be necessary. But this right cannot be extended to the case of an officer whose duty it is to attach property whenever he is requested so to do. He may or may not require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not in fact in the debtor, he might by the owner of the property be resisted to any extremity. The rule would be the same when he called out the *posse comitatus*, and the question whether the officers of justice, or the rioters, shall be held liable to indictment, must depend upon the decision of some abstract question of property, which the sagacity of no man was sufficient to foresee. And if the owner of property may resist an officer in its defence, so may one who believes himself the owner; for it will not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible.

We believe the better and safer and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property even cannot justify resistance, but must yield the possession, and resort to his remedy by action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involve.

The rule here established does not impugn that which is found in the books, "that an illegal arrest may be resisted." If the process is void, or is misapplied, it is the same as if there were no process, so far as one's person is concerned. But the case of property is very different. It depends upon *criteria* which are not the objects of sense.

<sup>1</sup> The statement of facts has been condensed. The arguments of counsel and a part of the opinion are omitted. — ED.

It is well settled that if an officer have probable cause to suspect one of felony, he may proceed to arrest him by any force necessary, and is justified, notwithstanding the person shall prove to have been innocent. 2 Hale, 79; 1 East, 301; *Samuel v. Payne*; 1 Russell on C. 504.

The judgment of this court is, that respondents take nothing by their motion or exceptions, and judgment was rendered against the respondents.<sup>1</sup>

# COMMONWEALTH v. A. KENNARD AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1829.

[*Reported in 8 Pickering, 133.*]

PARKER, C. J., delivered the opinion of the court.<sup>2</sup>

The question then is reduced to this: whether the owner of goods which are in his actual possession, may not lawfully defend his possession of them against a seizure or an attachment by an officer, who comes to take them on a precept against another person, who has no right or interest in the goods.

Certainly the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment, by one who is arrested on a writ or warrant against another person.<sup>3</sup> In such case there is no authority for the arrest, and

<sup>1</sup> *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208; *Faris v. Stab*, 3 Oh. St. 158; *State v. Miller*, 12 Vt. 437 (*semble*); *Merritt v. Miller*, 13 Vt. 416 (*semble*); *State v. Buchanan* 17 Vt. 573 *Accord.* — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

<sup>3</sup> *Glasspoole v. Young*, 9 B. & C. 696; *Davies v. Jenkins*, 11 M. & W. 745 (*semble*); *Buck v. Colbath*, 3 Wall. 334; *North v. Peters*, 138 U. S. 271; *Sexey v. Adkinson*, 34 Cal. 346; *Brichman v. Ross*, 67 Cal. 601, 605; *Watson v. Watson*, 9 Conn. 140, 147; *Mitchell v. Malone*, 77 Ga. 301; *Miller v. Bannister*, 109 Mass. 289; *Cook v. Hopper*, 23 Mich. 511; *Kane v. Hutchinson*, (Mich. 1892) 53 N. W. R. 624; *Braley v. Byrnes*, 20 Minn. 435; *Cross v. Phelps*, 16 Barb. 502; *Rogers v. Weir*, 34 N. Y. 463; *Maley v. Barrett*, 2 Sneed, 501; *Hays v. Creary*, 60 Tex. 445; *Formwalt v. Hylton*, 66 Tex. 288; *Heidenheimer v. Sides*, 67 Tex. 32 *Accord.*

In *Buck v. Colbath*, *supra*, Miller, J., said, p. 342: "Property may be seized by an officer of the court under a variety of writs, orders, or processes of the court. For our present purpose, these may be divided into two classes: —

"1. Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

"2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without

the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person arrested, will justify any resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer.<sup>1</sup>

We cannot distinguish between an officer who assumes to act under a void precept, and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B, is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person

describing any specific property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, *elegit*, or other writ, by which an ordinary judgment is carried into effect.

"It is obvious, on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts.

"And in addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not. Such is the habitual course of the court of chancery, operating by injunction against persons who interfere by means of other courts. And instances are not wanting, where other courts have in a summary manner protected their officers in the execution of their mandates.

"It is creditable, however, to the respect which is paid to the process of courts of competent jurisdiction in this country, that the occasion for the exercise of such a power is very rare.

"In the other class of writs, to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is subject to be taken under the writ; and *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." In confirmation of this distinction drawn by Mr. Justice Miller, see *Wilmarth v. Burt*, 7 Met. 257; *Woods v. Davis*, 34 N. H. 328; *Foster v. Pettibone*, 20 Barb. 350; *Watkins v. Page*, 2 Wis. 92; *Weinberg v. Conover*, 4 Wis. 803; *Griffith v. Smith*, 22 Wis. 646. — Ed.

<sup>1</sup> *Oliver v. State*, 17 Ark. 508; *Wentworth v. People*, 5 Ill. 550; *Elder v. Morrison*, 10 Wend. 128; *Brownell v. Durkee*, 79 Wis. 658 *Accord*.

See *Braddy v. Hodges*, 99 N. Ca. 319. — Ed.

against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary. *Marshall v. Hosmer*; <sup>1</sup> *Bond v. Ward*.<sup>2</sup>

It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover, or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen; but it is not a fair argument against the existence of a right, that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion that it belongs to the debtor, and the owner might be driven to a replevin, in which he must give bond with surety, or to his action for damages, in which the expense may consume the value of the property.

But it is again said, that the rule sought to be established by the defence will deprive creditors of the power of trying the question of property, in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass, if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty.

It will be recollected, that this is a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants to whose care they were committed; that they did nothing more than defend, with no more than necessary force, their possession. This decision, therefore, will form no precedent for cases which may be differently circumstanced. *Money v. Leach*; <sup>3</sup> *Ackworth v. Kemp*; <sup>4</sup> *Sanderson v. Baker*.<sup>5</sup>

We have had no authorities cited on the part of the Commonwealth, which have any tendency to show that the owner and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept.

<sup>1</sup> 4 Mass. R. 63.

<sup>2</sup> 7 Mass. R. 123.

<sup>3</sup> 1 W. Bl. 555.

<sup>4</sup> 1 Doug. 40.

<sup>5</sup> 2 W. Bl. 832.

There are cases which show that if an officer, having a precept against a person privileged from arrest, shall arrest him, he will not be a trespasser. But in such case he is commanded to arrest the particular person, and is supposed to know nothing of the privilege; the party therefore shall be held to apply for his discharge to the court having jurisdiction of the matter.

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### COMMONWEALTH v. MORRIS CROTTY AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1865.

[*Reported in 10 Allen, 403.*]

INDICTMENT for a riot.

BIGELOW, C. J.<sup>1</sup> We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights, art. 14, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest or seizure. This is in fact only a declaration of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void. 1 Hale P. C. 577; 2 Ib. 119; Foster, 312; 7 Dane Ab. 248; 1 Chit. Crim. Law, 39; Mead v. Haws,<sup>2</sup> and cases cited.

This rule or principle does not prevent the issue and service of a warrant against a party whose name is unknown. In such case the best description possible of the person to be arrested is to be given in the warrant; but it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified. 1 Chit. Crim. Law, 39, 40.

<sup>1</sup> Only the opinion of the Court is given. — Ed.

<sup>2</sup> 7 Cow. 332.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; *Shadgett v. Clipson*,<sup>1</sup> *Rex v. Hood*,<sup>2</sup> *Hoye v. Bush*,<sup>3</sup> *Pearce v. Atwood*,<sup>4</sup> *Sanford v. Nichols*,<sup>5</sup> *Commonwealth v. Kennard*; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose. 1 Chit. Crim. Law, 44; *The King v. Osmer*.<sup>6</sup>

The defendants, therefore, in resisting the officer in making an arrest under the warrant in question, if they were guilty of no improper or excessive force or violence, did not do an unlawful act by lawful means, or a lawful act by unlawful means, and so could not be convicted of the misdemeanor of a riot, with which they are charged in the indictment.

The instructions under which the case was submitted to the jury did not meet this aspect of the case. It must therefore go to a new trial.

*Exceptions sustained.*<sup>7</sup>

## PAUL POOLER v. WILLIAM F. REED.

IN THE SUPREME JUDICIAL COURT, MAINE, JANUARY 5, 1882.

[Reported in 73 *Maine Reports*, 129.]

TRESPASS in which damages are claimed for an alleged illegal arrest of the plaintiff by the defendant, at Bangor, in June, 1880.

Writ was dated December 8, 1880.

The opinion states the material facts.

*H. L. Mitchell*, for the plaintiff.

*Barker, Vose and Barker*, for the defendant.

LIBBEY, J. The defendant justifies the arrest and imprisonment of the plaintiff, as constable of Bangor, having a legal *mittimus* therefor. He thus puts directly in issue his legal capacity as such officer.

His appointment to and acceptance of the office of justice of the peace, after his election and qualification as constable, must be held to be a surrender of the office of constable. *Stubbs v. Lee*.<sup>8</sup>

<sup>1</sup> 8 East, 328.

<sup>2</sup> 1 Mood. C. C. 281.

<sup>3</sup> 2 Scott N. R. 86.

<sup>4</sup> 13 Mass. 324, 344.

<sup>5</sup> *Ib.* 286.

<sup>6</sup> 5 East, 304-308.

<sup>7</sup> *King v. Osmer*, 5 East, 304; *Shadgett v. Clipson*, 8 East, 328; *Rex v. Hood*, 1 Moody C. C. 281; *Hoye v. Bush*, 2 Scott, N. R. 86; *Mitchell v. State*, 12 Ark. 50, 56 *Accord.* — ED.

<sup>8</sup> 64 Maine, 195.



He was an officer *de facto* when he made the arrest, and while acting as such officer, his acts would be valid as to third parties; and as between them his title to the office could not be tried; but when he is a party and justifies his acts as such officer, he must show that he has a legal title to the office. *Stubbs v. Lee*,<sup>1</sup> *Fowler v. Bebee*,<sup>2</sup> *Sheehan's Case*,<sup>3</sup> *Green v. Burke*,<sup>4</sup> *People v. Hopson*,<sup>5</sup> *Reddle v. Bedford*,<sup>6</sup> *Parker v. Luffborough*,<sup>7</sup> *Keyser v. McKissam*.<sup>8</sup>

In accordance with the agreement of the parties,

*The action must stand for trial.*<sup>9</sup>

## GALLIARD, APPELLANT, v. LAXTON, RESPONDENT.

IN THE QUEEN'S BENCH, FEBRUARY 22, 1862.

[Reported in 2 *Best & Smith*, 363.]

THE judgment of the court was delivered by

WIGHTMAN, J.<sup>10</sup> The first question proposed to us is of much general importance, inasmuch as it may arise in cases where resistance to an arrest may be carried to the extent of wounding or even killing the officer.

It appears that a warrant had been made by a magistrate for the county of Chester, directed "To the constable of the township of Nantwich, in the county of Chester, and all Her Majesty's officers of the peace in and for the said county;" commanding them or some or one of them forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for not obeying a bastardy order for payment of money. This order is stated to have been given to the superintendent of police, and by him to have been given to the police at Monks Copenhall in the county of Chester, (of which place William Galliard is stated in the warrant to be); and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard; but he had it not with him at the time he made the arrest, it being then at the station-house at Monks Copenhall, in the actual possession of the superintendent of police there.

<sup>1</sup> 64 Maine, 195.

<sup>2</sup> 9 Mass. 231.

<sup>3</sup> 122 Mass. 445.

<sup>4</sup> 23 Wend. 490.

<sup>5</sup> 1 Denio, 574.

<sup>6</sup> 7 Serg. & R. 386.

<sup>7</sup> 10 Serg. & R. 249.

<sup>8</sup> 2 Rawle, 139.

<sup>9</sup> *Miller v. Callaway*, 32 Ark. 666; *Rodman v. Harcourt*, 4 B. Mon. 224, 229; *Patterson v. Miller*, 2 Met. (Ky.) 493; *Stubbs v. Lee*, 64 Me. 195; *Fowler v. Bebee*, 9 Mass. 231, 235; *Short v. Symmes*, 150 Mass. 298; *State v. Dierberger*, 90 Mo. 369, 375; *Brewster v. Hyde*, 7 N. H. 206; *Blake v. Sturtevant*, 12 N. H. 567, 572; *Green v. Burke*, 23 Wend. 490, 503-504; *People v. Hopson*, 1 Den. 574, 579; *People v. Nostrand*, 46 N. Y. 375; *Riddle v. Bedford*, 7 S. & R. 386, 392; *Venable v. Curd*, 2 Head, 582, 586; *Cummings v. Clark*, 15 Vt. 653 *Accord.* — ED.

<sup>10</sup> Only the opinion of the court is given. — ED.

On the night of the 1st of July last, Dyson, with another police constable of the county, arrested William Galliard under the warrant, but did not produce it, nor were they asked to produce it; and the question is whether, to make the arrest legal, they must at the time have had the warrant with them, ready to have been produced if necessary.

The warrant is not addressed to any officer by name, but to the constable of Nantwich, and all the peace officers of the county generally, and this general form of direction seems to be warranted by the 5 G. 4, c. 18, s. 6, and Dyson and the other policeman both came within the description of the persons to whom it is addressed. We are not told what words were used by the officers at the time they made the arrest, but as no point seems to have been raised upon any omission to inform William Galliard of the nature of the charge, it may be presumed that they did tell him, not only that they arrested him under the warrant, but what the charge was. As they were obviously police constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest, but that as this was not a charge of felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced, if required, and that an arrest without such production would not be legal. The production of the warrant was not however required before or at the time that the arrest was made, notwithstanding the resistance of the appellant and his brother, nor indeed at any time; and as the warrant was in existence at the station-house, where no doubt it could readily have been procured, it may be said that there was no reason for its being in the hands or the pocket of one of the officers, and no disadvantage to the person arrested by reason of its not being there. That, no doubt, may be so under the circumstances which occurred in this case; but suppose it had happened that, after the arrest had been effected in spite of the resistance made, and before the appellant's brother had been taken to the station-house where the warrant was, he had requested the officers to produce it, which, not having it, they could not do, how would the case have stood then? We have already expressed our opinion that, if requested, the officers were bound to produce the warrant, and, if so, the keeping him in custody *after* such request and non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal, though the detention, under the circumstances above supposed, would be illegal; and in this view of the case it appears to us that the officers were bound to have the warrant ready to be produced if required, and that, if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed; and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed from the allegation of delivery to them,

that they continued to hold it. Machalley's Case<sup>1</sup> is distinguishable, on the ground suggested by Mr. East in his Treatise on Pleas of the Crown, vol. 1, p. 319, citing 1 Hale, P. C. 458; and, indeed, we are unable to find any case in which the precise point raised for our consideration has been decided: but we are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that, not having it, they were not justified in making the arrest.

*Conviction quashed.*<sup>2</sup>

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DANIEL FIRESTONE v. W. J. RICE AND F. FENN.

IN THE SUPREME COURT, MICHIGAN, JULY 11, 1888.

[Reported in 71 Michigan Reports, 377.]

MORSE, J.<sup>3</sup> This suit was brought to recover damages for false imprisonment and assault and battery upon the plaintiff, alleged to have taken place on the night of August 6, 1885. Rice, at the time, was sheriff of Allegan County, and Fenn was night-watch of the village of Allegan. The arrest occurred in the township of Monterey, in that county. Upon the trial it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one Zeigler, who was arrested at the same time and place as the plaintiff.

The court instructed the jury that if Fenn knew that Rice was sheriff, and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and their verdict, as to Fenn, should be no cause of action.

"Under the laws of this State, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable, and for that reason I give you this request."

The jury rendered a verdict in favor of both defendants.

The plaintiff alleges error in the charge of the court as above given. There was no error in this direction. It is admitted that Fenn did nothing in wantonness or in malice. He went to the house of Zeigler,

<sup>1</sup> 9 Co. 65 b.

<sup>2</sup> Reg. v. Chapman, 12 Cox C. C. 4; Codd v. Cabe, 1 Ex. D. 352; Cabell v. Arnold, (Texas, 1893) 22 S. W. R. 62 Accord. — Ed.

<sup>3</sup> Only a part of the opinion of the court is given. — Ed.

where the arrest was made, at the request of the sheriff, and while there, under his direction, placed handcuffs upon plaintiff, and rode beside him in a buggy to Allegan. The court would have been warranted in directing a verdict in Fenn's favor.

The sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace;<sup>1</sup> and, if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment.<sup>2</sup>

We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offence charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required.

Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff. *McMahan v. Green*,<sup>3</sup> *Reed v. Rice*.<sup>4</sup>

*Judgment affirmed.*<sup>5</sup>

<sup>1</sup> How. Stat. § 591.

<sup>2</sup> How. Stat. § 9250.

<sup>3</sup> 33 Vt. 69.

<sup>4</sup> 2 J. J. Marsh. 44.

<sup>5</sup> *Elliot v. Besey*, Skin. 50, *per Saunders arguendo*; *Reed v. Rice*, 2 J. J. Marsh. 44; *McMahan v. Green*, 34 Vt. 69 *Accord*.

*Oystead v. Shed*, 12 Mass. 506, 511; *Elder v. Morrison*, 10 Wend. 128 *Contra*.

In *Elder v. Morrison*, *supra*, Savage, C. J., said, p. 138: "Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one." — Ed.

## B. v. SHERIFF OF MIDDLESEX.

IN THE COMMON PLEAS, EASTER TERM, 1488.

[Reported in *Year-Book*, 18 *Edward IV.*, folio 4, placitum 4.]

*Catesby* came to the bar and showed how a *fieri facias* was directed to the sheriff of Middlesex to make an execution for one J. on a judgment for J. against one B.; and afterwards B. put all his goods into a chest sealed and locked. The sheriff broke the door of the house, and entered and carried off the goods. And whether the sheriff committed any tort.

LITTLETON, J., and all his companions held that the party might have a writ of trespass against the sheriff for breaking his house, notwithstanding the *fieri facias*, for this writ shall not excuse him for breaking into the house, but only for the taking of the goods<sup>1</sup> &c. *Quod nota.*

## SIR THOMAS KEMP v. WINDSOR.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1578.

[Reported in 4 *Leonard*, 41, placitum 111.]

SIR THOMAS KEMP was outlawed at the suit of one Windsor, who had against him four *capias ullagat*, and none of them were served, and afterwards he sued out a fifth *capias*: It was moved by *Mead*, that the said Sir Thomas keepeth open house, and yet the sheriff had not served the *capias*. *Dyer*. The sheriff may justify to break the house to take his body, and seize his goods for the queen,<sup>2</sup> for this process is in law at the suit of the queen; but contrary where the process is sued at the suit of a subject: and the justices commanded Ford, prothonotary, to make a special *capias* for body and goods; and a pain in the writ of £100 upon the sheriff to execute the writ accordingly.

<sup>1</sup> Bro. Ab. Execution, 100; Bro. Ab. Trespass, 390; Semayne's Case, 5 Rep. 91; Goudowin v. Lewis, 10 A. & E. 120; Percival v. Stump, 9 Ex. 167 (*semble*; see Duke v. Slowman, 8 C. B. 317) *Accord*.

But in this country the sheriff who wrongfully breaks the outer door is liable in trespass, not only for the entry, but also for the seizure of the goods. *Ilseley v. Nichols*, 12 Pick. 270; *Swain v. Mizner*, 8 Gray, 182; *Bailey v. Wright*, 39 Mich. 96; *Welch v. Wilson*, 34 Minn. 92 (*Mitchell, J.*, dissenting); *Closson v. Morrison*, 47 N. H. 482, 485; *People v. Hubbard*, 24 Wend. 369, 4 Hill, 437. — *Ed.*

<sup>2</sup> Y. B. 13 Ed. IV., fol. 9, pl. 4; Semayne's Case, 5 Rep. 91; *Briggs's Case*, 1 Rolle, R. 336; *King v. Bird*, 2 Show. 87; *Burdett v. Abbot*, 14 East, 1, 157; *Launock v. Brown*, 2 B. & Al. 592; *Harvey v. Harvey*, 26 Ch. D. 644; *Kelsy v. Wright*, 1 Root, 83; *State v. Shaw*, 1 Root, 134; *State v. Smith*, 1 N. H. 346; *Bell v. Clap*, 10 Johns. 263 *Accord*.

*Demand*.—But a demand must be made before breaking open the door. *Semayne's Case*, 5 Rep. 91; *King v. Bird*, 2 Show. 87; *Launock v. Brown*, 2 B. & Al. 592; *Kelsy v. Wright*, 1 Root, 134; *State v. Smith*, 1 N. H. 346; *Bell v. Clap*, 10 Johns. 263. — *Ed.*

## SEMAYNE v. GRESHAM.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1603.

[Reported in *Yelverton*, 28.<sup>1</sup>]

GRESHAM and one Beresford were joint tenants of an house in London, in which house Beresford had several goods; and being indebted to Semayne, and judgment given against him for the debt, died possessed of the said goods, in the said house. Gresham continued possessed in the house by survivor; Semayne took execution for the goods of Beresford; the sheriff of London, taking with him a jury to praise the goods of the said Beresford, came to the said house to serve the execution; which Gresham perceiving, before the sheriff had entered the house, shut the door of the said house, and would not suffer the sheriff nor the jury to enter to view and praise the goods; whereupon Semayne brought an action on the case against Gresham for disturbing the said execution, and declared upon all the preceding matter. And (by FENNER and YELVERTON) the action does not lie; for Gresham has done nothing but what he may lawfully justify, viz., shut his own doors. And although the execution had been for the debt of Gresham, yet before the sheriff's entry into the house it had been lawful for him to shut the door; for, unless it was upon a *capias utlagatum*, which is the queen's suit, for the contempt of the party, it is not lawful for the sheriff to enter the house unless it is open;<sup>2</sup> as 18 E. 4, 4, is: *Concessum* by all the justices, contrary to the book 18 E. Execution. And also in this case (*per* FENNER) if the sheriff himself might have entered, yet it is not lawful to bring a jury into the house to praise the goods; for it was very inconvenient to have so large a company in an house, and might be prejudicial to the party, by the loss of the goods, &c. POPHAM, *contra*, because by this means justice is hindered; for execution is the effect of the whole suit; and if execution cannot be made, but is prevented by this means, then it will be in vain to sue: and therefore he conceived the book in 18 E. 2, Execution, is better law than 18 E. 4, and he was of opinion that upon an execution between party and party, the sheriff might enter and break the door; to which FENNER, Justice, answered, that if the sheriff might by law in such case break the house, then also clearly the action does not lie; for then, although Gresham shut the door of the house, it was the sheriff's fault that he did not break it. *Quod* YELVERTON granted afterwards. Trin. 2 Jac. Judgment was given against the plaintiff *per totam curiam*.

<sup>1</sup> 5 Rep. 91; Cro. El. 908; Moo. 668; Brownl. 50, s. c. — Ed.

<sup>2</sup> *Malever v. Spink*, Dy. 36, pl. 41; *Foster v. Hill*, 1 Bulst. 146; *Parke v. Evans*, Hob. 62; *Cook's Case*, Cro. Car. 537; *Hopkins v. Nightingale*, 1 Esp. 99; *Kerbey v. Denbey*, 1 M. & W. 336; *Hodson v. Towning*, 5 Dowl. P. C. 410; *Whalley v. Williamson*, 7 C. & P. 294; *Duke v. Slowman*, 8 C. B. 317; *Snydacker v. Brosse*, 51 Ill.

## BISCOP v. WHITE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1600.

[Reported in *Croke, Elizabeth*, 759.]

TRESPASS for breaking his house. The defendant justifies his entry into the house by virtue of a warrant of the sheriffs upon a *fiery facias* awarded to levy such a debt *de bonis et catallis quæ fuerunt Philip Biscop testatoris, tempore mortis in manibus Lucretiæ Biscop*, his executrix; and saith, that the executrix was in the plaintiff's house *cum bonis suis*, and there abided; and for that the door of the house stood open, he entered to levy that debt, &c. — It was thereupon demurred; and adjudged to be an ill bar, because he doth not allege that *bona testatoris* were in the house, but *bona propria executricis*,

357; *State v. Beckner*, (Ind. 1891) 26 N. E. R. 553; *Calvert v. Stone*, 10 B. Mon. 152 (but compare *Keith v. Johnston*, 1 Dana, 604); *Heminway v. Saxton*, 3 Mass. 222; *Oystead v. Shed*, 13 Mass. 520; *Ilseley v. Nichols*, 12 Pick. 270; *Swain v. Mizner*, 8 Gray, 182; *Welch v. Wilson*, 34 Minn. 92; *People v. Hubbard*, 24 Wend. 369; *State v. Armfield*, 2 Hawks. 246; *State v. Hooker*, 17 Vt. 658; *Hooker v. Smith*, 19 Vt. 151 *Accord*.

*Douglass v. State*, 6 Yerg. 525 (*semble*) *Contra*.

Compare *Fitz. Ab. Execution*, 152.

*What is a Breaking.* — The mere opening of a shut, though unlocked door, is a breaking within the doctrine of the principal case. 1 Roll. Ab. Distress (M) 1; Com. Dig. Execution (C. 5) (C. 12); *Boggs v. Vandyke*, 3 Harringt. 288; *Curtis v. Hubbard*, 1 Hill, 336, 4 Hill, 437. Compare *State v. Beckner*, (Ind. 1891) 26 N. E. R. 553.

But see, *contra*, *Ryan v. Shilcock*, 7 Ex. 72, 21 L. J. Ex. 55, s. c.; and compare *Nash v. Lucas*, L. R. 2 Q. B. 590, 593-4; *Crabtree v. Robinson*, 15 Q. B. D. 312, 314.

So is the simple opening of a window, *Nash v. Lucas*, L. R. 2 Q. B. 590, but not the elevation of a window already open, *Crabtree v. Robinson*, 15 Q. B. D. 312.

*Dwelling-house.* — An officer may in the execution of private process break into any building which is not occupied as a dwelling-house, *e. g.* a barn or store. *Penton v. Brown*, 1 Sid. 186; 1 Keb. 698; s. c.; *M'Gee v. Givan*, 4 Blackf. 16 (*semble*); *Platt v. Brown*, 16 Pick. 553; *Haggerty v. Wilber*, 16 Johns. 287; *Clark v. Wilson*, 14 R. I. 11; *Solinsky v. Lincoln Bank*, 85 Tenn. 368; *Fullerton v. Mack*, 2 Aik. 415; *Burton v. Wilkinson*, 18 Vt. 186. But a distrainer may not break even a detached barn or similar building. *Brown v. Glenn*, 16 Q. B. 254; *American Co. v. Hendry*, 37 Sol. J. 341.

*Exceptions to General Rule.* — The outer door may be broken in order to retake an escaped prisoner arrested in civil process. *Anon.*, 7 Mod. 8; *Anon.*, Loft, 390; *Sandon v. Jervis*, 3 E. B. & E. 935, 942.

Or in order to re-enter where the officer, after entering through an open door, has been forcibly ejected from the house. *Pugh v. Griffith*, 7 A. & E. 827; *Eagleton v. Guttridge*, 11 M. & W. 465; *Aga Kurboolie v. Queen*, 4 Moo. P. C. 239; *Bannister v. Hyde*, 2 E. & E. 627. See also *White v. Wiltshire*, Cro. Jac. 555, 1 Roll. R. 137, Palm, 53 s. c.; *Glover v. Whittenhall*, 6 Hill, 597.

Or, where the owner of a house has brought or received into his house the goods of another, with the design of shielding them from legal process. *Semayne's Case*, 5 Rep. 91; *De Graffenreid v. Mitchell*, 3 McC. 506. — Ed.

which were not liable to execution. But if *bona testatoris* had been there, it was conceived that the entry had been justifiable.<sup>1</sup> Wherefore it was adjudged for the plaintiff.

### LEE v. GANSEL.

IN THE KING'S BENCH, JANUARY 25, 1774

[Reported in Cowper, 1.]

LORD MANSFIELD delivered the opinion of the court<sup>2</sup> as follows:—

This is an application on the part of General Gansel to be discharged out of custody on the following ground. That the process issued against him by this court has been abused, and his person illegally arrested; for that the officer *broke open* the *door* of his apartment which by law he could not do: therefore the court ought to discharge him, and put him in the same condition as before the arrest.

The case is this. Mr. Mayo was *owner* of this house, in which General Gansel had at the time in question, and for a long time before, taken the first floor, which consisted of two rooms, each of which had a door that opened upon the staircase; he had likewise up two pair of stairs, two rooms, each of which had a door that opened in the same manner: he had the use of the kitchen besides, and he rented these several apartments as a *lodger* from *year to year*, though that circumstance makes no difference. Mr. Mayo *lived* in the house; and, which is the *material* part of the case, there is but *one outer door* to the house; at which Mr. Mayo enters to go to his apartment, and Mr. Gansel to go to his. This is a fact concerning which there is no controversy. Mr. Gansel was up two pair of stairs in his bed-chamber, and as he says, the door was locked; and that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking. The question is, “Whether by law this door could be broken open.”

I should first state however, that the *outer door* of the *house* was *open*, and that the officers entered there legally. The question therefore turns upon the subsequent breaking open of the bed-chamber door.

The books talk of the *privilege* of a *mansion-house* and of the privilege of the *door* of it, which cannot be broken open. The whole question will therefore turn upon the *extent* of that which is called

<sup>1</sup> Cooke v. Birt, 5 Taunt. 765, 769, 771; Johnson v. Leigh, 6 Taunt. 246; M'Gee v. Givan, 4 Blackf. 16; Walker v. Fox, 2 Dana, 404 *Accord*.

But if the execution defendant is a resident in the house of a stranger, and not a mere guest, the entry of the officer through an open door is justifiable, even though there be no goods there subject to execution. Sheere v. Brooks, 2 H. Bl. 120; Moorish v. Murray, 13 M. & W. 52 (*semble*). — Ed.

<sup>2</sup> Only the opinion of the court is given, and that is slightly abridged. — Ed.



*privilege*. Now this rule of privilege, arising from a sound maxim of *policy*, is no privilege of a *debtor* properly speaking who absconds from justice in avoidance of legal process; but is annexed to the *house* and *door* (to which door I forbear at present to give any particular epithet) for the *protection* of a man and his family. It is therefore by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is this, “*that a greater evil should be avoided for a less, and that a less good should give way to a greater.*” The *outer* door therefore or window of a man’s house, says the law, shall *not* be *broken* open by process. This has been long and well understood. The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken *strictly*, and not to be extended by any equitable analogous interpretation.

The oldest case to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the Year-Book 18 Ed. 4, page 4, pl. 19. “There, an action of trespass was brought for *breaking* the *outer* door in execution of a *fiery facias*. The court held, that trespass would lie, for the officer shall *not break* open an *outer* door to execute his process: but when the officer had so got in, he *broke* open a *trunk*, and took out the goods that were in it; in respect of which they held, that trespass would not lie; for he had a right to break the trunk, and take the goods.” I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to show, that the rule of privilege is taken most *rigidly*. Afterwards, in *Semaine’s Case*,<sup>1</sup> the same strict doctrine was held, namely, “that breaking open the *outer* door was a trespass, but that taking away the goods was lawful.” In *Yelverton*, Mich. 44, El. 29, which was the same case, Popham doubted whether *even* the *outer* door was privileged, because it would be a hindrance to justice; but afterwards, in Mich. 2 Jac. 5 Co. 92 b, 93 a, the whole court held, “that the *outer* door ought not to be *broken open* ;” and grounded their opinion upon the single authority of 18 Ed. 4, p. 4, pl. 19, before quoted. You see from hence with what *rigor* the privilege has been construed in the oldest cases.

But no case or *dictum* has been cited at the bar, nor indeed did there ever exist a case, which intimated a doubt whether an *inner* door might *not* be *broken* open.<sup>2</sup> In Hob. 62 and 263, among other outrageous

<sup>1</sup> 5 Co. Mich. 2 Jac. p. 93.

<sup>2</sup> *King v. Bird*, 2 Show. 87; *Hutchinson v. Birch*, 4 Taunt. 619; *Lloyd v. Sandilands*, 8 Taunt. 250; *Prettyman v. Dean*, 2 Harringt. 494; *Stedman v. Crane*, 11 Met.

things the bailiff broke open a chamber door, having entered legally at the outer door; but such breaking was held lawful, the first entrance at the outer door, which was open, having been legal: and yet the latter was a very harsh case, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay stress on this to show how *strictly* the privilege has been understood, when the *outer* door or *window* is secure, and when the entrance has not been forcible through either of them, so as to lay open the house and its inhabitants to insult and violence from without; but on the contrary has been quiet and peaceable. In addition to these authorities, I recollect a note of a case lately determined, which says, "an *inner* door has *no* protection at all." It was the case of Astley and Pindar, and was heard in the year 1760, Mich. 1 Geo. 3. There, all the other charges against the bailiffs were answered, except breaking the *inner* door, which was accompanied with such violence, that the door fell, and the officer with it into the room: but all the court were of opinion, that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Besides these cases, and in conformity to the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is Foster C. L., title Homicide, c. 8, sect. 20, which is this. "The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps further than in the scale of reason and sound policy they will warrant. But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any *extension*. It must, therefore, as I have before hinted, be confined to the breach of windows and of outer doors intended for the security of the house against persons from without, endeavoring to break in."

This brings the question to this point, "Whether this was the *outer* door to the *house* of the defendant? for the law, we have seen, does not privilege an *inner* door."

It has been said, that this lodging is an house, and has an outer door; and it has been likened to the case of chambers in the inns of court and in colleges, which have each an outer door that opens, like the door in question, upon the common staircase, and which, in cases of burglary, have been held to be the houses of the respective occupiers. The fact is, that from the nature of those buildings, they are *all* as *several* houses, and have *separate* *outer* doors which are the extremity of obstruction; because the *staircase* is no outer door. Again, they are enjoyed as separate property: In Lincoln's Inn, they have separate estates of inheritance; in the others, they have estates

295; Stearns v. Vincent, 50 Mich. 209; Williams v. Spencer, 5 Johns. 352; Hubbard v. Mack, 17 Johns. 127; Hagar v. Danforth, 20 Barb. 16; Clark v. Wilson, 14 R. I. 11, 12; State v. Thackam, 1 Bay, 358.

Nor is any demand necessary before breaking an inner door. Hutchinson v. Birch, 4 Taunt. 619 (qualifying Ratcliffe v. Burton, 3 B. & P. 223). — Ed.

for life, and in colleges as long as they reside. So, if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses, as Newcastle-house.<sup>1</sup>

The distinction therefore can only be between several outer doors, and one outer door.

How far Lord Hale meant to carry his opinion in the passage that has been cited, it is difficult to say. Where a burglary is committed in the apartments of one who lodges in a house, the circumstance of the *owner's living* in it, or his occupying only a shop or cellar in which he does *not sleep*, makes a very material difference as to the form of the indictment; for in the latter case the *lodger* has the *outer* door entirely to himself; and the burglary in such case, must be laid to be in the house of the lodger; but it is otherwise in the former case, for there it must be laid to be in the house of the owner. And notwithstanding the greatness of Lord Hale's authority, it appears not clearly expressed, or perhaps not fully considered; at all events, we must not determine upon a single and uncertain *dictum*, against the many late and positive cases, grounded on the oldest decisions and most established principles.

But, if there were nothing more to confute the doctrine which has exhausted so much learning and ingenuity in support of it, the absurdity of the proposition would of itself be sufficient. And it is this, that whereas the *greatest house* in London has but *one* outer door; this gentleman having *four rooms* in one house, shall have *four* distinct *outer* doors. If any of them could be said to be an outer door, it must be the door of the lower rooms; but the truth is, they are *all inner* doors.

Therefore we are all most clearly of opinion, that by law, *this* door was *legally broken* open.

With regard to the point of relief, in case the arrest had been illegal, I give no opinion; though I think it would depend upon the behavior of the party applying. It is possible a person might come to ask that relief, under circumstances of such gross misbehavior as might induce the court to refuse it. Though the court, where a person is arrested who has been attending its process, will interpose, not only by punishing the officer, but by discharging the prisoner out of custody; yet cases of this sort are always matters of discretion with the court under their particular circumstances. But it is not necessary here to enter into that point; as we are all clearly of opinion that General Gansel was legally arrested; and, therefore, ought not to be discharged.

*Per cur. Rule discharged.*

<sup>1</sup> Swain v. Mizner, 8 Gray, 182; Stearns v. Vincent, 50 Mich. 209 *Accord.* — Ed.

## SECTION VII.

*Trespass ab initio.*

1 NICHOLS, BRITTON, 137, 138.

1290.

WHERE any one, finding himself aggrieved by a wrongful detaining of his cattle or of his chattels, shall have obtained our writ to the sheriff, and found pledges to prosecute his plaint, let the sheriff immediately go or send some known bailiff to the place where the plaintiff says the distress is detained; and when the sheriff or his bailiff come there, let him demand a view of the beasts or chattels whereof the plaint is made. . . . If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villain of the deforcer, let him immediately raise the hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so.<sup>1</sup>

## ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1474.

[Reported in *Year-Book*, 13 *Edward IV.*, folio 6, placitum 2.]

LITTLETON, J. If the beasts of a tenant are distrained, the mesne ought to release them, and put beasts of equal value of his own in their place. And he ought to do this regardless of the lord. And if the lord will not permit him to do so, then shall the first taking by the lord be tortious, for it is not taken according to the notion of a distress, any more than in the case where the lord puts the beasts on his plough.<sup>2</sup>

<sup>1</sup> In Y. B., 21 & 22 Ed. I. 106, goods distrained were replevied. "*Hertham*. Sir, why did you allow deliverance of the beasts to be made? Why did not you avow the ownership?" *Hyham*. If we had avowed the ownership, he would have sued an appeal against us."

In Y. B., 32 & 33 Ed. I. in replevin for a cow against B., B. claimed that the cow was his. "HOWARD, J. You, who are plaintiff, will you sue in any other mode against A. [B. ?] *Malberthorp*. Nay, but if the court can allow the ownership to be tried in this writ, we will aver that the beast was ours, &c., and is, &c. HOWARD, J. The ownership cannot be tried in this writ; therefore the court adjudges, &c., that this beast be restored."

<sup>2</sup> See further Y. B., 5 Ed. III. fol. 3, pl. 11, as explained in 3 Harv. L. Rev. 32; 30 Ed. III. fol. 9, pl. 3. — ED.

<sup>2</sup> "And if the lord will not suffer the mesne in that case to take the cattle of the

## DUNCOMB v. REEVE AND GREEN.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1601.

[Reported in *Croke, Elizabeth*, 783.]

TRESPASS, for the taking of certain raw hides. The defendant justifies as bailiff of Ipswich, by custom there, that if any butcher kills any beast within that town, and sells the flesh within the market, he is to pay twopence for every hide: and that the bailiffs may distrain the hide for the twopence, if it be denied; and so justifies for that, &c. The plaintiff replies, that after the distress the defendants tanned the hides, and so converted them to their use, &c. The defendants by rejoinder say, that they tanned them, because otherwise they would have rotted. And thereupon the plaintiff demurred. — THE COURT held it to be an ill plea: for the custom to distrain doth not enable them to tan; for that is tortious, because thereby the property is *quasi* altered, and the marks to know them are taken away from the owner, so as he cannot have them again. And although one may in some cases meddle with and use a distress, where it is for the owner's benefit, as POPHAM said; as where one distrains armor, he may cause them to be scoured to avoid rust; so if one distrains raw-cloth, he may cause it to be fulled, for it is for the owner's benefit. But here this tanning is not for his benefit; for it takes from him the notice of the thing, and so is a means of taking away the thing itself; for he cannot have any knowledge thereof to have it again.<sup>1</sup>

tenant out of the pound, he is a trespasser *ab initio*; for he doth not use them according to the notion for distress; and thereto agree 13 Ed. IV. 6, 7 b.

"If he who has distrained detains the beasts after amends tendered before the impounding, he is a trespasser *ab initio*. 45 Ed. III., 9 b. *Contra*, Co. 8, Six Carpenters, 147." — Roll. Ab. Trespass *ab initio*.

Y. B. 45 Ed. III. fol. 9 b, pl. 13, supports Rolle. See also Y. B. 13 Hen. IV. fol. 17, pl. 14. — Ed.

<sup>1</sup> The sale of a distress makes the seller a trespasser *ab initio*. *Pledall v. Knapp*, 1 And. 65, pl. 139; *Cox v. Robertson*, 1 Bibb, 604.

So does a sale of the whole of a chattel under process against one of its co-owners. *Smyth v. Tankersley*, 20 Ala. 212; *Daniel v. Owens*, 70 Ala. 297 (*semble*); *Edgar v. Caldwell*, Morris, Iowa, 434; *Spalding v. Black*, 22 Kas. 55; *Moore v. Pennall*, 52 Me. 162; *Melville v. Brown*, 15 Mass. 82; *Walker v. Fitts*, 24 Pick. 191, 194; *Waddell v. Cook*, 2 Hill, 47; *Atkins v. Saxton*, 77 N. Y. 195, 200; *Ryder v. Gilbert*, 16 Hun, 163; *Snell v. Crowe*, 3 Utah, 27; *Ford v. Smith*, 27 Wis. 261. Or, indeed, any wrongful sale under execution. *Stephens v. Lawson*, 7 Blackf. 275; *Parish v. Wilhelm*, 63 N. C. 50; *Cressy v. Parks*, 76 Me. 532; *Wilson v. Ellis*, 28 Pa. 238; *Freeman v. Smith*, 30 Pa. 264; *Van Dresor v. King*, 34 Pa. 201; *Hall v. Ray*, 40 Vt. 576; *Wilson v. Blake*, 53 Vt. 305; *Buzzell v. Johnson*, 54 Vt. 90.

See also *Gibson's Case*, Lane, 90; *Walgrave v. Skinner*, Ow. 120, 2 Roll. Ab. 561, pl. 6, s. c.; *Barrett v. White*, 3 N. H. 210, for further instances of a subsequent conversion which made the original taking a trespass *ab initio*.

Subsequent conduct not amounting to a conversion of the chattel previously taken will not make the taker a trespasser *ab initio*. *Grill v. Hunter*, 40 Ala. 546; *Waterbury v. Lockwood*, 4 Day, 257; *Paul v. Slason*, 22 Vt. 221. — Ed.

## OXLEY v. WATTS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1785.

[Reported in 1 Term Reports, 12.]

THIS was an action of trespass for taking a horse, tried before Lord Mansfield, at the last Summer Assizes, at Maidstone.

The defendant, as bailiff of Lord Dartmouth, lord of the manor of A., justified taking the said horse as an estray.

Replication, that after the taking mentioned in the declaration, the defendant worked the said horse, and so became a trespasser *ab initio*.

*Erskine* now moved to set aside the verdict, which had been obtained by the plaintiff, on the ground that this should have been an action on the case for the consequential damage, and not an action of trespass, because the original taking was admitted to be lawful.

But *per Curiam*, The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*. *Rule refused.*<sup>1</sup>

## EDITH DE WACHEFORD v. WILLIAM NETEBEHT.

IN THE KING'S COURT, MICHAELMAS, 1233.

[Reported in 2 Bracton's Note Book, 632, Number 824.]

ON the Monday after St. Martin's, Edith de Wacheford offered herself in the court of Windsor against William Netebeht, and said that William, against the peace of God and of our lord the king, and his bailiffs, unjustly detained from her three pigs, which had disappeared without her consent [*addirati*], and thereupon she brings her suit to show that they were her pigs, raised by her, and that they had disappeared without her consent. And William was present, and denied the unjust detention against the said Edith and her suit, and said that those pigs were delivered to him with others to keep at pasture, and he denied that they had ever belonged to Edith, or were raised by her, or had disappeared without her consent, and he offered to prove that as the court should award. And Edith went out and sought counsel, and in truth said that William, against the peace of our lord the king, and his bailiffs as a thief had feloniously stolen the said pigs, one of which she

<sup>1</sup> Y. B. 18 Hen. VI. fol. 9 b, pl. 7; Y. B. 2 Ed. IV. fol. 5, pl. 9; Y. B. 22 Ed. IV. fol. 5, pl. 16; Y. B. 22 Ed. IV. fol. 47, pl. 12; Dod v. Monger, 6 Mod. 215, 216; Gargrave v. Smith, 1 Salk. 221; Lawton v. Ward, 1 Ld. Ray. 75; Gates v. Bayley, 2 Wils. 313 (*semble*); Dye v. Leatherdale, 3 Wils. 20; Lamb v. Peck, 8 Vt. 407; Briggs v. Gleason, 29 Vt. 78; Collins v. Perkins, 31 Vt. 624 *Accord.* — ED.

then held by her hand, and she was ready to prove this against him, as a woman against a thief, since he feloniously refused to give up her lawful chattels.<sup>1</sup>

# 1 NICHOLS, BRITTON, 68.

1290.

WAIFS or estrays, not challenged within the year and day, shall belong to the lord of the franchise, if he be rightfully seised of such franchise; but if the lord did not cause the beast so found to be publicly cried in manner aforesaid, then no time shall run against the owner of the thing or beast, to bar him from replevying it whenever he pleases; and if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost [*adirree*] in form of trespass, or an appeal of larceny, by words of felony.<sup>2</sup>

<sup>1</sup> Compare the following from Bracton, fol. 150 b, who is speaking of one taken with the mainour after fresh pursuit: "The pursuer may at the outset proceed civilly or criminally at his option; for he may demand his chattel as having disappeared without his consent [*adiratam*] by the testimony of worthy men, and so obtain his chattel, although stolen. But if the one taken with the mainour will not comply with his demand, he may proceed further, and demand it as stolen, and say that he who has it is a thief, or can name the thief, and that he took it feloniously, by stealth and theft and against the peace of our lord the king, and by stealth carried it off, . . . and let the appellee defend the felony and larceny either by a jury or by his body, according to his election and the award of the court." — ED.

<sup>2</sup> "No person can detain from another birds or beasts, *feræ naturæ*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays." — 1 Nichols, Britton, 215.

Y. B. 38 Hen. VI. fol. 26, pl. 12. "*Wangford*. I think that if I lose a box of charters touching lands to which I have no title, still I shall have an action of detinue. PRISOR, C. J. I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice. . . . *Littleton*. I think in Wangford's case he who lost the charters shall have detinue without any other title; as if I distrain for rent, and afterwards the termor offers me the rent and arrears, and I refuse to give up the distress, still he shall not have trespass against me, but detinue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters, it was lawful, and although he did not give them up on request, he shall not have trespass, but detinue against me, for no trespass is done yet; no more than where one delivers goods to me to keep and re-deliver to him, and I detain them, he shall never have trespass, but detinue against me *causa qua supra*; but perhaps if he burnt them, or broke the seals and the like, trespass would lie; *ad quod non fuit responsum*."

Y. B. 2 Rich. III. fol. 15, pl. 39. "It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detinue." — ED.

## EAST v. NEWMAN.

IN THE QUEEN'S BENCH, HILARY TERM, 1595.

[Reported in *Goldsborough*, 152, *placitum* 79.]

EAST, executor of I. S., brought an action upon the case of finding and converting of certain goods, against Newman, and upon not guilty pleaded, the jury found this special verdict, viz. that the testator was possessed of divers goods, and them lost, and the defendant found them, and knowing them to be the goods of the testator, upon demand denied to deliver them; and if this denial was a conversion they prayed the discretion of the court. FENNER. I think that the denial is a conversion; for when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is.<sup>1</sup>

## HIGGINBOTHAM v. STODDARD.

IN THE KING'S BENCH, HILARY TERM, 1613.

[Reported in 2 *Rolls*, *Abridgment*, 563, *placitum* 14.]

IF one makes his executors and dies, and the executors find among the goods of the testator an obligation whereby the testator was bound to J. D., and they, thinking the obligation was discharged, since the day of payment was passed, broke the seal, they are trespassers *ab initio*, although they came lawfully to that, that is by finding. Adjudged.<sup>2</sup>

## BAGSHAWE v. GOWARD.

IN THE KING'S BENCH, HILARY TERM, 1606.

[Reported in *Croke*, *James*, 147.<sup>3</sup>]

TRESPASS for taking and carrying away a gelding. Plea, that defendant took it as an estray. Replication that the defendant labored the gelding, riding upon him and drawing with him. Demurrer.<sup>4</sup>

<sup>1</sup> "The reason of those who held the refusal [in *East v. Newman*] to be a conversion was that he came to the goods by finding; and the denial of them afterwards made him a trespasser *ab initio*; which cannot be law, this being only a nonfeasance." — *Per COKE*, in *Isaac v. Clark*, 1 *Roll. R.* 136. — Ed.

See also *Y. B.* 7 Ed. IV. fol. 3, pl. 9; *Gardener v. Campbell*, 15 *Johns.* 400, 401 (questioned in *Stoughton v. Mott*, 25 *Vt.* 668, 674). — Ed.

<sup>2</sup> But see *Taylor v. Jones*, 42 *N. H.* 25. — Ed.

<sup>3</sup> 1 *Yelv.* 96, *Noy*, 119, s. c. — Ed.

<sup>4</sup> The statement of the case is abridged. — Ed.



It was alleged, that this is a departure: for now it appears that the first seizure was lawful, and he brings the action for the abuse, which is matter subsequent at another day; so he ought to have brought the action for the *tort*, if he did any, for the offence the last day, and not for the taking, &c.; therefore the replication doth not maintain the declaration for the trespass alleged the first day: Also, the using of the estray by way of riding or drawing in a cart, being proper services for him, is no cause of action; because he who hath property may use it, so as he doth not misuse it: and he who hath an estray may for that cause use him; but then he must not demand anything for the meat of such an estray. But a distress may not be used, because he hath it by law only as a gage; and this case is not like to the abusing of a distress, or the exceeding of an authority in law; for there trespass lies *ab initio*, as 21 Edw. 7, pl. 22; 33 Hen. 6, pl. 26; 11 Hen. 4, pl. 75; 5 Hen. 7, pl. 10; 10 Edw. 4, pl. 2. But he who abuseth an authority *in fait* is not punishable in trespass, but by action on the case, for exceeding the authority given him; as 2 Edw. 4, pl. 4; 12 Edw. 4, pl. 8; 18 Edw. 4, pl. 27; 21 Edw. 4, pl. 75; and the abuse of the estray (he having a property) is the cause of the action upon the case; so this action *vi et armis* lies not. — But ALL THE COURT (POPHAM absent) held, that there is not any difference betwixt this case and the case of a distress; for he hath it by authority in law, wherefore he is punishable for the abuse by trespass as a trespasser *ab initio*.<sup>1</sup>

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## ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1500.

[Reported in Year-Book, 16 Henry VII., folio 2, placitum 7.]

TRESPASS *de bonis asportatis*, with force and arms. The defendant said by *Keble* that J. W. was possessed of the goods and sold them to the plaintiff, who left them in the possession of J. W. to the use of the plaintiff, and afterwards J. W. delivered the goods to the defendant to carry to Grocers' Hall in London, by force of which the defendant took them accordingly. Judgment, if action &c. *Fineux*. When one buys goods of me and leaves them in my possession, the property and possession is straightway in him, and for a detention afterwards trespass lies against me, *quod fuit negatum per totam curiam*, and likewise a *fortiori* against my bailee or vendee, *quod fuit etiam negatum*. For it was said where one obtains the possession of goods by lawful means through

<sup>1</sup> Weber v. Hartman, 7 Colo. 13; Barrett v. Lightfoot, 1 Mon. 241; Gibbs v. Chase, 10 Mass. 125, 128 (*semble*) Accord. — ED.

the immediate delivery of the plaintiff, one shall never be punished as a trespasser, but by a writ of detinue;<sup>1</sup> no more shall one's donee, vendee, or sub-bailee who comes to the plaintiff's goods by a mesne.<sup>2</sup> But if one takes them by his own wrong out of the possession of the immediate bailee of the owner, he shall be punished as a trespasser; and so a diversity.

## THE SIX CARPENTERS' CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1610.

[Reported in 8 Coke, 146 a.]

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house *præd tempore quo, &c., et diu antea et postea*, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd tempore quo, &c., viz., hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d.*, and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law), makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a tres-

<sup>1</sup> Y. B. 34 Hen. VI. fol. 5, pl. 15; Y. B. 13 Edw. IV. fol. 9, pl. 5; Y. B. 13 Edw. IV. fol. 27, pl. 23; Anon. Moore, 248; Fenn v. Bittleston, 7 Ex. 150; *Ex pa te* Chamberlain, 1 Sch. & Lef. 320, 322; Bradley v. Davis, 14 Me. 44; Chapman v. Andrews, 3 Wend. 240.

On the same principle, a bailee of goods who wrongfully converts them to his own use is not guilty of larceny. King v. Meeres, 1 Show. 50. — ED.

<sup>2</sup> Y. B. 2 Edw. IV. fol. 5, pl. 9; Y. B. 21 Hen. VII. fol. 39, pl. 49; Bradley v. Davis, 14 Me. 44; Marshall v. Davis, 1 Wend. 109. — ED.

passer *ab initio*: but where an entry, authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. *Vide* 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. *Vide* 12 E. 4, 8 b. 21 E. 4, 19 b. 5 H. 7, 11 a. 9 H. 6, 29 b. 11 H. 4, 75 b. 3 H. 7, 15 b. 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these, and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful: but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus*.

2. It was resolved *per totam curiam*, that not doing, cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass;<sup>1</sup> and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. *temp.* E. 1. Replevin 27. 27 E. 3, 88. 45 E. 3, 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 Edw. 4, 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put, is

<sup>1</sup> *Averill v. Smith*, 17 Wall. 82, 90; *Hinks v. Hinks*, 46 Me. 423; *Flinn v. Symonds*, 11 N. H. 363 *Accord.* — ED.

not law, for it is no trespass, but the taverner shall have an action of debt: and there before Brian held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessities thereto, as he should deserve, and that for making thereof, and all necessities thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessities to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessities thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress 70, and all this was resolved by the court. *Vide* the book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8 b, in the Mr. of St. Mark's case; and so is the opinion of Hull to be understood in 13 H. 4, 17 b, which opinion is not well abridged in title Trespass, 180. Note, reader, this difference that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said books in 13 H. 4, 17 b; 14 H. 4, 4; *Registr' Judic'*, 37; 45 E. 3, 9, and all the books before. *Vide* 14 Ed. 4, 4 b; 2 H. 6, 12; 22 Hen. 6, 57; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72, and Pilkington's case, in the fifth part of my Reports, fol. 76, and so all the books which *prima facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

## NANCY MALCOM v. ELIJAH K. SPOOR.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1847.

[Reported in 12 Metcalf, 279.]

SHAW, C. J. This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house, in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper; and other matters, which are not material to the decisions of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury, that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser *ab initio*; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff, and the question whether these instructions were right, has been submitted to us without argument.

It has been held as a rule of the common law, ever since the Six Carpenters' Case,<sup>1</sup> that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser *ab initio*. *Melville v. Brown*.<sup>2</sup> In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods, in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser *ab initio*.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See *Rowley v. Rice*.<sup>3</sup>

*Exceptions overruled.*<sup>4</sup>

<sup>1</sup> 8 Co. 146.

<sup>2</sup> 15 Mass. 82.

<sup>3</sup> 11 Met. 337.

<sup>4</sup> Y. B. 11 Hen. IV. fol. 75, pl. 16; Y. B. 22 Ed. IV. fol. 5, pl. 16; Ward's Case, Clayt. 44, pl. 76; *Juchter v. Boehm*, 67 Ga. 534; *Williams v. Powell*, 101 Mass. 467; *Davis*

## JEWELL v. MAHOOD.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JUNE, 1863.

[Reported in 44 New Hampshire Reports, 474.]

TRESPASS *quare clausum*. James Hall and Margaret Hall conveyed the premises to the plaintiff by a deed containing the following reservation :

"We, the said James Hall and Margaret Hall, reserving all the wood and timber on said lot, and are to have the privilege of entering upon said lot of land, and removing said wood and timber at any and all times, for the next five years ensuing from the date of this instrument."

Within said five years the defendant entered under the right of said Hall, and removed the wood. The plaintiff's cause of action was, and he offered evidence, that the defendant, having the right to enter to cut and remove the wood, in doing so did not put up the bars, whereby cattle entered and ate the plaintiff's oats; that he did not confine himself to one path, and threw some of the wood into the plaintiff's grass, and suffered it to remain there some time; that he put some of the wood into a low place, to make a causeway to draw the wood over.

The plaintiff claimed that the defendant, by abuse of his right, and by excess, was liable as a trespasser *ab initio*.

The court rejected the evidence, and ordered a nonsuit, and the plaintiff excepted, and the questions of law were reserved.

*Little*, for the plaintiff.

*Cilley*, for the defendant.

SARGENT, J. When the plaintiff in this case accepted the deed from James and Margaret Hall of the land in question, with the reservation specified, it was the same as though he had owned the land before, and had conveyed to said Halls the right to enter said premises during the time and for the purposes specified in the reservation. The defendant entered under an express authority; an authority in fact, and not one conferred or implied by law. It is well settled that where a man abuses an authority in law, by committing acts which are in themselves trespasses, not authorized by the authority, the party is a trespasser *ab initio*; but that when there is an authority in fact, and a party exceeds that authority, he is only liable for the excess. Six Carpenters' Case; Allen v. Crofoot; Cushing v. Adams;<sup>1</sup> Wendell v.

v. Stone, 120 Mass. 228; Cutter v. Howe, 122 Mass. 541, 544; Hazard v. Israel, 1 Binn. 240; Kissecker v. Monn, 36 Pa. 313; Snell v. Crowe, 3 Utah, 26 Accord.

Compare Page v. Depuy, 40 Ill. 506; Dwinnells v. Boynton, 3 All. 310; Adams v. Rivers, 11 Barb. 390; Taylor v. Jones, 42 N. H. 25, in which cases the subsequent misconduct was not thought sufficiently grave to make the original entry a trespass *ab initio*. — ED.

<sup>1</sup> 18 Pick. 114.

Johnson;<sup>1</sup> *Ferrin v. Symonds*;<sup>2</sup> *State v. Moore*.<sup>3</sup> In this case the gist of the action is the breaking and entering the plaintiff's close; the other circumstances are only stated as affecting the damages. But the defendant is not liable for breaking and entering, because he had the right to enter, and in this form of action if the breaking and entering is not made out the action fails. If the plaintiff would recover damages for any of the acts done after entry, he must bring case or trespass in some other form, and not trespass *quare clausum fregit*.

*Judgment on the verdict.*<sup>4</sup>

## ALLEN v. CROFOOT.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1830.

[Reported in 5 *Wendell*, 506.]

ERROR from the Cortland Common Pleas. Crofoot sued Allen in a justice's court, and declared against him in *trespass* for entering his house in his absence and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the general issue and license to enter the house. The court charged the jury, that if they should be of opinion that the defendant had acted unfairly or improperly in obtaining copies of the papers, and had gone to the plaintiff's house with the intention of fraudulently obtaining such copies, though he had leave to enter the house, they should find for the plaintiff; but if he acted correctly and openly, and had leave to enter the house, they should find for the defendant. The defendant excepted to this charge, and the jury found a verdict for the plaintiff with \$75 damages. The defendant sued out a writ of error.<sup>5</sup>

*J. A. Spencer*, for plaintiff in error.

*Greene C. Bronson*, (attorney-general,) for defendant in error.

*By the Court*, SAVAGE, Ch. J. It is urged by the plaintiff in error, that the court below erred in charging the jury that the action was sustainable, if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in *The Six Carpenters' Case* that where an authority to enter upon the premises of another is given *by law*, and it is subsequently abused, the party becomes a trespasser *ab*.

<sup>1</sup> 8 N. H. 220.

<sup>2</sup> 11 N. H. 363.

<sup>3</sup> 12 N. H. 42.

<sup>4</sup> *Ballard v. Noaks*, 2 Ark. 45; *Hunnewell v. Hobart*, 42 Me. 565; *Dingley v. Buffum*, 57 Me. 379; *Cushing v. Adams*, 18 Pick. 110; *Smith v. Pierce*, 110 Mass. 35; *Hubbard v. Kansas Co.*, 63 Mo. 68; *Wendell v. Johnson*, 8 N. H. 220; *Dumont v. Smith*, 4 Den. 319; *Boults v. Mitchell*, 15 Pa. 371; *Edelman v. Yenkel*, 27 Pa. 26; *Narehood v. Wilhelm*, 69 Pa. 64; *Stone v. Knapp*, 29 Vt. 501 *Accord.* — ED.

<sup>5</sup> The statement is abridged, and the arguments and a part of the opinion are omitted. — ED.

*initio*; but where such authority or license is given *by the party*, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser; and the reason of the difference is said to be, that in case of a license by law, the subsequent tortious act shows *quo animo* he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in Bacon's Abr. tit. Trespass, B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license, being obtained by fraud, was void. The defendant knocked at the door, and was told to walk in; he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practised a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises, Does he thereby become a trespasser *ab initio*?

It has been decided that to enter a dwelling-house without license, is in law a trespass,<sup>1</sup> and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place;<sup>2</sup> and it is argued that as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is *no license*. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it farther than to cases where the person enters under a license given him *by law*. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

The judgment must be reversed, without costs, and a *venire de novo* awarded by Cortland Common Pleas.

<sup>1</sup> 12 Johns. R. 408.

<sup>2</sup> 15 Johns. R. 186.



## CAROLINE ESTY v. JOHN S. WILMOT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1860.

[Reported in 15 Gray, 168.]

ACTION of tort for assault and battery. Trial and verdict for the plaintiff in the Superior Court in Middlesex, at September term 1859, before Vose, J., who signed this bill of exceptions : —

“ There was evidence tending to prove that the plaintiff was an operative in one of the mills in Lowell, and the defendant had charge of the section of the room where the plaintiff worked.<sup>1</sup>

“ The court ruled, and charged the jury, that if the plaintiff had been disorderly, and had committed any act affecting the discipline and good order of the room, or the success of the work carried on in the room, or creating disturbance in the room, the defendant had a right, under the direction of the overseer, to order her out, and, on her refusal to go, to use a sufficient and proper force to eject her from the premises; and if during the process of ejecting her from the room he used unnecessary and improper force and violence towards her, he thereby became a trespasser *ab initio*, and would be liable for all his acts.

“ The defendant did not object to this part of the charge at the time it was given, and asked for no instructions as to the extent of the liability of the defendant on account of any excessive force used by him. The defendant, feeling aggrieved by the above ruling, excepts thereto.”

*W. P. Webster*, for the defendant.

*D. S. Richardson* and *G. F. Richardson*, for the plaintiff.

HOAR, J. The distinction made in the Six Carpenters' Case, that “ when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*,” has been frequently recognized and applied in this Commonwealth, and is a familiar one. It is most commonly applied in cases of trespass to real estate where the original entry could not be resisted, being independent of the will or consent of the owner. It is also applicable in the case of officers serving legal process. The reason for the distinction, most commonly approved by modern text writers and judicial decisions, is this; that an officer or other person acting by authority of law shall not be allowed to avail himself of it as an instrument of oppression. As the citizen is bound to submit to it without resistance, and has no opportunity to make provisions or stipulations for his own

[<sup>1</sup> The statement is abridged, and the argument for the plaintiff is omitted. — ED.]

security, the exercise of the legal power is made conditional upon pursuing it wholly within legal limits. The abuse is held to be a forfeiture of the whole protection which the law gives to the act which it allowed. *Bac. Ab. Trespass, B. State v. Moore.*<sup>1</sup> 1 *Smith's Lead. Cas.* (5th Am. ed.) 216-221. *Allen v. Crofoot.*

But the abuse of the authority of law, which makes a man a trespasser *ab initio*, is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts lawful which the law does not forbid. And we are of opinion that the instruction given to the jury in the case now before us was erroneous, because the defendant was not in the exercise of any authority conferred by law, within the meaning of the rule in the *Six Carpenters' Case*, when he committed the assault complained of. He had the legal right to use the kind and degree of force necessary and appropriate to protect his person, and his employers' property, from the disorder and misconduct of the plaintiff. But the parties stood on equal terms in this respect. Their relation to each other was created by contract, and the right of the defendant to remove the plaintiff from the room for misbehavior was an incident to that relation.

The instruction given to the jury obviously extended to the whole grounds of defence, and was not of such a casual or incidental nature that the defendant was in fault for not calling attention to its inaccuracy before the jury retired.

*Exceptions sustained.*<sup>2</sup>

### • THE STATE v. MOORE. •

• IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JULY, 1841. •

[*Reported in 12 New Hampshire Reports, 42.*]

INDICTMENT for breaking and entering the house of Isaac Paddleford, at Lyman, in the night time, on the 19th day of November, 1840, with intent to steal, and stealing therefrom certain pieces of money.

GILCHRIST, J. A question of more difficulty is presented by the second objection. It is said, that as the prisoner was lawfully in the house, he cannot be convicted of the offence of entering in the night time with intent to steal.

The prisoner had a right to enter the inn, and the bar-room; and the question arises, whether the larceny committed in the bar-room can relate back, and give a character to the entry into the house, so as to make it criminal, and the prisoner punishable for it, upon reasoning similar to that which, in a civil action, would render him liable as a trespasser *ab initio*? Except the inference that may lawfully be made from the act of larceny, there is no evidence that he entered with any illegal purpose, or a felonious intent.

<sup>1</sup> 12 N. H. 42.

<sup>2</sup> *Turner v. Footman*, 71 Me. 218 *Accord.*

See also *Johnson v. Hannahan*, 1 Strob. 313, with the dissenting opinion by O'NEALL, J. — ED.

The existence of a distinction between the consequences of an abuse of an authority in law, and the abuse of an authority in fact, is well settled. In the former case, the party is a trespasser *ab initio*; in the latter, he is liable only for the actual tortious act. Different reasons have been given for the distinction, and it is important to determine what the reason actually is, in order to ascertain whether the principle of holding one a trespasser *ab initio*, be applicable in criminal cases.

In the Six Carpenters' Case, the reason is said to be, "that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for, *acta exteriora indicant interiora secreta*. But when the party gives an authority or license himself, he cannot for any subsequent cause punish that which is done by his own authority or license."

What is offered here as a reason for the distinction, is hardly more than a statement that such a distinction exists. And in the case of *Allen v. Crofoot, Savage, C. J.*, intimates that it is a distinction without a difference of principle. He proceeds to say that a better reason is given for it, in *Bac. Abr., Trespass B.* "Where the law has given an authority, it is reasonable that it should make void everything done by an abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because, it was the man's folly to trust another with an authority who was not fit to be trusted therewith."

Even here, however, it is not stated *why* it is reasonable that the law should make void everything done by an abuse of an authority.

A much more sensible reason for the distinction is given in *Hammond's Nisi Prius*, 59. He observes, that the reason given by Coke "cannot be the true reason of the rule, because, if the nature of the subsequent act of trespass was indicative of a previous evil intent, it must be so, not only in the instance where it has been perpetrated in executing an authority in law, but likewise where it has been committed in fulfilling an authority in fact. The ground, therefore, upon which one who has been guilty of an abuse is made a trespasser *ab initio*, is (for there is no other), that of policy, and the rule was instituted to prevent an authority in law being turned into an instrument of injustice and oppression." And *Richardson, C. J.*, says, in the case of *Barrett v. White & a.*,<sup>1</sup> that it would be contrary to sound public policy to permit a man to justify himself at all under a license or authority allowed him by law, after he had abused it, and used it for improper purposes. The presumption of law is, that he who thus abuses such an authority, assumed the exercise of it in the first place for the purpose of abusing it. The abuse is, therefore, held to be a forfeiture of all the protection which the law would otherwise give.

But where the authority is derived from an individual, and the authority is abused, the party becomes a trespasser for the excess only; "for the necessity and policy which, in the instance where an authority in law has been abused, operate to invalidate the proceedings from the commencement, no longer exist." *Hammond's Nisi Prius*, 66.

These remarks seem to us a sensible exposition of the reason of the distinction. Where the law invests a person with authority to do an act, the conse-

<sup>1</sup> 3 N. H. Rep. 227.

quences of an abuse of that authority by the party, should be severe enough to deter all persons from such an abuse.

But has this "policy of the law" ever been extended to criminal cases? We are not aware that it has. It is true that, in order to ascertain the intent of the accused, the law often regards the nature of the act committed. But this is generally such an act as could not have been committed with any other than a criminal purpose. Thus, the act of secretly taking the property of another, necessarily raises the presumption that the party intended to steal, and this presumption stands until explained by other evidence. In an indictment for breaking, &c., with intent to commit a felony, the actual commission is so strong a presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in the indictment. But where one lawfully enters a house, it by no means follows, that because he steals, while there, he entered with that purpose. The act of stealing is evidence of the intent to steal; but is hardly sufficient to rebut the presumption that where he lawfully entered, he entered for a lawful purpose. To hold that, for a lawful entry, a party could be punished, because, after such entry, he does an unlawful act, would be to find him guilty of a crime by construction; a result which the law, in its endeavors always to ascertain the real intention of the accused, invariably, in theory, avoids, and which has seldom, in modern times, happened in practice.

A case is put by Lord Hale, the reasoning of which is analogous to that we have used in this case. "It is not a burglarious breaking and entry, if a guest at an inn open his own chamber door, and takes and carries away his host's goods, *for he has a right to open his own door*, and so not a burglarious breaking." 1 Hale P. C. 553, 554.

If a burglary could not be committed because the party had a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful.

For these reasons, the judgment of the court is, that the verdict be set aside and a

*New trial granted.*<sup>1</sup>

REPLEVIN AGAINST A TRESPASSER AB INITIO. — The origin of trespass *ab initio* in the case of chattels has been so completely lost sight of that in modern times replevin has been allowed against a trespasser *ab initio*. *Hopkins v. Hopkins*, 10 Johns. 369. — Ed.

<sup>1</sup> *Commonwealth v. Tobin*, 108 Mass. 426 *Accord.* — Ed.

## CHAPTER II.

## DISSEISIN AND CONVERSION.

## SECTION I.

*Disseisin.*

BRACTON, fol. 161 b, Twiss's Translation, 3 Tw. Br. 17. Likewise a disseisin takes place, not only if any one ejects the true owner when present, or his agent, or his family, or does not admit him, or repels him on his return from market or from a journey, but he also effects a disseisin, if he shall not permit the owner or his agent or his family being in possession to make use of it, or at least hinders him from making a convenient use of it. And in which case, although he does not altogether expel [the owner], nevertheless he inflicts upon him a disseisin, since he takes away from him altogether the convenience of using it, or hinders him from using it conveniently, quietly, and in peace, by disquieting and disturbing his possession. Likewise a disseisin takes place not only according to what has been said above, but also if any person of greater power wishes to make use of the tenement of another against the will of the tenant, by ploughing, or by digging, by reaping and carrying away, contending that the tenement, which is another's, is his own; but if he has made no claim to the tenement, it will be another thing, because then there will be a trespass, and not a disseisin from a freehold.<sup>1</sup>

LITTLETON, § 279. And note that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.

COKE, 2d Inst. 414. By the common law a man that is in seisin of his land may have an assise, for that he is disseised of the quiet enjoying of his land; as when the lord, or any other that hath a rent, and oftentimes distraineth for the rent, where none is behind, the tenant shall have an assise of novel disseisin of the land, for that, by reason of the *frequentie* of distresses, he is disseised of the quiet enjoying of his land, and cannot make his advantage thereof, and *frequentia mutat transgressionem in disseisinam*.

\* "Et si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseysinam sed transgressionem" (Bracton, fol. 216 b). See also 1 Nich. Britton, 272, 343. — ED.

WILLELMUS DE ESTRE v. ROGERUM DE SANCTO  
DIONISIO.

IN THE KING'S COURT, HILARY TERM. 1230.

[*Reported in 2 Bracton's Note Book, placitum 378.*]

ROGERUS DE SANCTO DIONISIO et Sarra uxor eius athachiati fuerunt ad respondendum Willelmo de Estre quare contra pacem et dignitatem domini Regis arrauerunt et sulcauerunt et foderunt pasturam suam de Eceles unde idem Willelmus queritur quod propter hoc deterioratus est et dampnum habet ad ualenciam etc.

Et Rogerus et Sarra ueniunt et defendunt quod nichil arrauerunt nec sulcauerunt nec foderunt de pastura uel terra ipsius Willelmi, et dicunt quod pastura illa ipsorum est et non ipsius Willelmi. Et quia ipsi Rogerus et Sarra aduocant terram illam ut suam et pasturam, et idem Willelmus ut suam, Consideratum est quod ipsi Rogerus et Sarra inde sine die et Willelmus perquirat sibi per breue de noua disseisina si uoluerit.<sup>1</sup>

ANONYMOUS.

IN THE COMMON PLEAS. TRINITY TERM, 1340.

[*Reported in Year Book 14 Edward III., Rolls Series, 230, placitum 20.*]

TRESPASS against bailiffs of Ancient Demesne, in which after the record had been, for a cause, removed into the Bench, the bailiffs continued to hold the plea, notwithstanding the removal, until the tenant who now brings this writ lost the land. The bailiffs abode judgment whether the present plaintiff ought to be answered as to this plaint, inasmuch as he showed that it was a disseisin effected on him, wherefore he might recover by novel disseisin both the freehold and damages, as appears above in Easter Term in the 12th year. And afterwards they departed in contempt of court, whereupon the plaintiff prayed judgment for himself. And the matter was pending until now. SCHARSHULLE rehearsed as above, and said: "Even had the bailiffs abode judgment, there is no ground upon which to give judgment for them; but since they have departed in contempt of the court, it seems to us that judgment shall be given against them. Therefore the court adjudges that

<sup>1</sup> Professor Maitland adds in a note to this case: "The time is not yet when title shall be tried in an action of trespass *vi et armis*; but this is a noteworthy attempt."

There are several reported cases of the thirteenth century in which, as in the principal case, the plaintiff failed in trespass, because the defendant's entry was under a claim of right to the freehold; *i. e.*, was a disseisin. [1253] Plac. Ab. 132, col. 2, rot. 13, Essex; [1253] Plac. Ab. 142, col. 1, rot. 9, Lanc.; [1272] Plac. Ab. 262, col. 1, rot. 18, Cant.; [1272] Plac. Ab. 262, col. 1, rot. 19, Essex. — *Ed.*

they be taken for the contempt, and that the plaintiff do recover his damages according to his count."<sup>1</sup>

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### ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1352.

[*Reported in Liber Assisarum, 26 Edward III., placitum 17.*]

It was found by verdict of the Assise of Novel Disseisin that the plaintiff had cut trees on his own soil, and the tenant, who had common there, said that the soil was his soil, and ordered the plaintiff not to cut any trees, whereupon the plaintiff departed, and now brings the assise.

SHARESHULL, C. J., said that he who had no right cannot be seised of a freehold by words. But if one having a right of entry was disturbed, as he was coming to the land, from entering, it is a disseisin. Wherefore the plaintiff took nothing.

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### PLOT'S CASE.

IN THE COMMON PLEAS, EASTER TERM, 1618.

[*Reported in 9 Viner's Abridgment, 85, placitum 5.*]

If a man hath an house and locks it, and departs, and another comes to his house, and takes the key of the door into his hand, and says that he claims the house to himself in fee without any entry into the house, this is a disseisin of the house. Admitted clearly upon evidence at the bar in an assize taken by default.

<sup>1</sup> See also Y. B. 11 & 12 Ed. III. (Rolls Series), 503, 505.

After the decision in the principal case the distinction between a trespass and a disseisin lost its value for the purpose of the action trespass *quare clausum fregit*. The distinction, however, is one founded in the nature of things, and still plays a prominent part in our law. Thus, a mere trespasser never gains a title by lapse of time. The wrong-doer must be also an adverse possessor, in other words a disseisor. This substitution of the term "adverse possession" for disseisin is one of the curiosities of our legal terminology. — ED.

## SECTION II.

*Conversion.*

## (a) NONFEASANCE.

## MULGRAVE v. OGDEN.

IN THE QUEEN'S BENCH, HILARY TERM, 1591.

[Reported in *Croke, Elizabeth*, 219.]

ACTION SUR TROVER of twenty barrells of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c.; but for negligent keeping no law punisheth him. *Et adjournatur*.<sup>1</sup>

## ROSS v. JOHNSON.

IN THE KING'S BENCH, FEBRUARY 4, 1772.

[Reported in 5 *Burrow*, 2825.]

IN an action of trover before Lord Mansfield the plaintiff was nonsuited, subject to the opinion of the court on the following case:—

The goods in question, being the property of the plaintiff, were delivered by the captain of the vessel to the defendants as wharfingers, for the use and upon the account of the plaintiff, to whom they were directed, but were stolen or lost out of their possession; and afterwards, before the commencement of this action, were demanded by the plaintiff of the defendants, to whom he tendered the wharfage for the same; but the goods were not delivered to him.<sup>2</sup>

LORD MANSFIELD declared his disapprobation of nonsuits founded upon objections which had no relation to the merits of a cause. But

<sup>1</sup> *Isaac v. Clark*, 2 Bulst. 306, 312; *Bromley v. Coxwell*, 2 B. & P. 438; *Conner v. Allen*, 33 Ala. 515; *Savage v. Smythe*, 48 Ga. 562; *Sturges v. Keith*, 57 Ill. 451; *Railroad Co. v. Kidd*, 7 Dana, 252; *Ragsdale v. Williams*, 8 Ired. 498; *Emory v. Jenkinson*, Tapp. 219; *Ankim v. Woodward*, 6 Whart. 577; *Jones v. Allen*, 1 Head, 626; *Abbott v. Kimball*, 19 Vt. 558; *Nutt v. Wheeler*, 30 Vt. 436; *Tinker v. Morrill*, 39 Vt. 477; *Bailey v. Moulthrop*, 55 Vt. 13 *Accord.* — Ed.

<sup>2</sup> The statement is abridged, and the arguments are omitted. — Ed.



he looked upon it as established upon principles and authorities, that trover would not lie in the present case; but that it must be an action upon the case.

It is impossible, he said, to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger; but in order to maintain trover there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods. They cannot deliver them; it is not in their power to do it. It is a bare omission.

Mr. Justice ASTON agreed, that this being a bare omission, and no evidence of a conversion, trover would not lie; but the clear remedy was by action upon the case; and he cited *Owen v. Lewyn*,<sup>1</sup> where Hale said, "that if a carrier loseth goods committed to him, a general action of trover doth not lie against him."

Mr. Justice WILLES and Mr. Justice ASHHURST concurring in opinion with his Lordship and Mr. Justice ASTON,

*The court ordered that the nonsuit should stand.*<sup>2</sup>

## FARRAR v. ROLLINS.

SUPREME COURT, VERMONT, AUGUST TERM, 1864.

[Reported in 37 Vermont Reports, 295.]

TROVER for a sled. Plea: Not guilty. *Verdict for plaintiff.*

POLAND, C. J.<sup>3</sup> It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, Cole, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the

<sup>1</sup> 1 Ventris, 223.

<sup>2</sup> *George v. Wiburn*, 1 Roll. Abr. 6 pl. 4; *Lowndes's Case*, Clayt. 104; *Owen v. Lewyn*, 1 Vent. 223; *Anon.*, 2 Salk. 655; *Attorsol v. Bryant*, 1 Camp. 409; *Severin v. Keppel*, 4 Esp. 156; *Williams v. Gesse*, 3 Bing. N. C. 452; *Heald v. Carey*, 21 L. J. C. P. 97; *Dearbourn v. Un. Nat. Bank*, 58 Me. 273; *Dwight v. Brewster*, 1 Pick. 50; *Bowlin v. Nye*, 10 Cush. 416; *Robinson v. Austin*, 2 Gray, 564; *Dorman v. Kane*, 5 All. 38; *Smith v. Nat. Bank*, 99 Mass. 605; *Johnson v. Strader*, 3 Mo. 359; *Packard v. Getman*, 4 Wend. 613; *Lockwood v. Bull*, 1 Cow. 322; *Hawkins v. Hoffman*, 6 Hill, 586; *Scovill v. Griffith*, 12 N. Y. 509; *Nat. Bank v. Wheeler*, 48 N. Y. 492; *Briggs v. N. Y. Co.*, 28 Barb. 515; *Louisville Co. v. Campbell*, 7 Heisk. 253 *Accord*.

Compare *Gr. W. Co. v. Crouch*, 3 H. & N. 183; *La Place v. Aupoix*, 1 Johns. Ca. 406; *Holbrook v. Wright*, 24 Wend. 177; *Decker v. Shelton*, 1 Th. & C. 224. — Ed.

<sup>3</sup> Only the opinion of the court is given. — Ed.

plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled he borrowed it for himself, and not for the defendant. The defendant made no claim to the sled, and no objection to the plaintiff's taking it; he only refused to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed, the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant inconsistent with the plaintiff's right. The plaintiff could have his sled when he called for it, but insisted the defendant should fulfil his duty, or perform his contract by carrying it home.

*Judgment reversed and case remanded.*<sup>1</sup>

<sup>1</sup> Fifield v. Maine Co., 62 Me. 77; Bassett v. Bassett, 112 Mass. 99; O'Connell v. Jacobs, 115 Mass. 21; Ware v. First Society, 125 Mass. 584; Dame v. Dame, 38 N. H. 429; Gillet v. Roberts, 57 N. Y. 28; Munger v. Hess, 28 Barb. 75 *Accord*.

Compare Bank of America v. McNeil, 10 Bush, 54; Powell v. Powell, 3 Hun, 413; Richards v. Pitts Works, 37 Hun, 1. — Ed.

SECTION II. (*continued*)..

(b) DESTRUCTION, OR CHANGE IN NATURE OR QUALITY OF A CHATTEL.

## RICHARDSON v. ATKINSON.

AT NISI PRIUS, CORAM EYRE ET FORTESCUE, 1723.

[*Reported in 1 Strange, 576.*]

THEY held that the drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole.<sup>1</sup>

## SIMMONS v. LILLYSTONE.

IN THE EXCHEQUER, FEBRUARY 12, 1853.

[*Reported in 8 Exchequer Reports, 431.*]

THE second count was in trover for the conversion of goods and chattels, to wit, five hundred pieces of timber.

Pleas (*inter alia*) to the whole declaration, not guilty.

The plaintiff joined issue on the first plea.

At the trial, before Pollock, C. B., at the London sittings after last Michaelmas term, it appeared that the plaintiff carried on the business of a mast, oar, and block maker at Milton next Gravesend. The evidence in support of the second count was, that certain pieces of timber or spars used for making bowsprits, and belonging to the plaintiff, being on the defendant's land, he caused them to be removed; and upon the timber being again placed there, and having become imbedded in the soil, the defendant directed his workmen to dig a saw-pit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them was afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining imbedded in the soil.

<sup>1</sup> Dench v. Walker, 14 Mass. 500 [August, 1780. Trover for four hogsheads of rum. On the trial, the evidence appeared thus:—

Walker undertook to transport from Boston to Springfield the four hogsheads of rum for the plaintiff. At the time of the delivery to Walker, the rum was good; but on its arrival at Springfield, it was much adulterated and greatly lessened in value; and whether it was thus adulterated by the defendant himself, or by his servant the teamster, did not appear. It was objected that trover did not lie in this case.

But CUSHING, C. J., with the rest of the court, held that it will lie. For the alteration of the quality of the liquor undertaken to be transported, whether it was done by the defendant or his servant, was an unlawful conversion. — *Vide* Holt, 528.] See also Holsworth's Case, Clayt. 57; Burnham v. Marshall, 56 Vt. 365. — Ed.

It was objected, on the part of the defendant, that there was no evidence of a conversion. His lordship was of opinion that there was *prima facie* evidence of a conversion. The jury found a verdict for the plaintiff; damages £60.

*Bramwell*, in last Michaelmas term, having obtained a rule *nisi*, *Shee*, Serjt., and *Rose* showed cause in Hilary term (January 27).

There was evidence of a conversion. In order to constitute a conversion, it is not necessary that there should be an acquisition of property by the defendant: it is sufficient if there be a deprivation of property to the plaintiff. *Keyworth v. Hill*. [PARKE, B. Here the defendant never intended to take to himself any property in the timber.] If a person purposely left the gate of a field open, so that a horse escaped, that would amount to a conversion. [PARKE, B. The form of a count in trover, prescribed by the Common-law Procedure Act, 15 & 16 Vict. c. 76, Sched. (B.), is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Suppose a person threw a stone into a room through an open window, and broke a looking-glass, would that be a conversion of it?] It is submitted that any wilful damage to a chattel, whereby the owner is deprived of the use of it in its original state, is a conversion. [PLATT, B. Taking wine from a cask and filling it up with water is a conversion of the whole liquor. *Richardson v. Atkinson*.] The principle laid down in *Fouldes v. Willoughby* is, that a mere wrongful asportation does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel. Here the cutting of the timber destroyed it as timber. In the case of two tenants in common, each has an interest in the chattel, so that nothing short of an absolute destruction of it will amount to a conversion; but, in ordinary cases, any injury which alters the nature or quality of the chattel is a conversion of it.

*Willes*, in support of the rule.<sup>1</sup>

PARKE, B. The question which relates to the count in trover is, whether there was any evidence of a conversion. Now the evidence was that the pieces of timber were cut in two by the defendant; that they were left imbedded in the soil, — not applied to the defendant's own use, — and that part of them was carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it,

<sup>1</sup> The argument of the defendant is omitted. — ED.

although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river, — not purposely thrown by the defendant to be washed away; consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise whether that conversion was not excused by the right which the defendant had to make the saw-pit, and to cut the timber in making it, if he was not able to do it in any other way. But, without deciding that, we think that there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use; that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property. None of those alternatives are made out by the evidence, and consequently there ought to be a verdict for the defendant on the plea of not guilty to the count in trover.

*Rule accordingly.*<sup>1</sup>

<sup>1</sup> See *Philpott v. Kelley*, 3 A. & E. 106; *Byrne v. Stout*, 15 Ill. 180; *Sanderson v. Haverstick*, 8 Pa. 294. — ED.

SECTION II. (*continued.*)

(c) ASPORTATION.

## BASSET v. MAYNARD.

IN THE QUEEN'S BENCH, EASTER TERM, 1601.

[*Reported in 1 Rolle, Abridgment, 105 (M) placitum 5.*]

IF I cut certain wood, and a stranger takes it out of my possession, although I may have an action of trespass, still I may also have an action on the case [*i. e. trover*] at my election.<sup>1</sup>

## TINKLER v. POOLE.

IN THE KING'S BENCH, NOVEMBER 11, 1770.

[*Reported in 5 Burrow, 2657.*]

THIS was an action of trover for goods seized by a custom-house officer. It was a parcel of herrings seized by him for not having satisfied the salt duty, and carried by him to the king's warehouse. It was agreed that they were not seizable; and the only question was, "whether this species of action lay against the officer for seizing them and carrying them away."

*Glynn*, Serjt., for the plaintiff, argued that it did.<sup>2</sup>

There is indeed a single *nisi prius* case reported in Bunbury, 67, Mich. 1720, at Guildhall sittings after that term, before Ld. Ch. Baron Bury: *Etrick v. An Officer of the Revenue*. Upon an information of seizure of goods, there had been a verdict for the defendant, who afterwards brought trover against the officer for the goods. The Attorney-

<sup>1</sup> Trover was not originally concurrent with trespass for a taking. Indeed, the year before the principal case the Court of Common Pleas, in *Bishop v. Montague*, Cro. El. 824, were equally divided upon the question; but on a re-argument, in 1604, it was decided by three judges against two in favor of the plaintiff's election, as in the principal case. The Exchequer gave a similar decision in 1610, *Leveson v. Kirk*, 1 Roll. Ab. 105 [M] pl. 10. In *Kinaston v. Moore*, Cro. Car. 89, we read, "*Semble per all the justices and barons, although he take it as a trespass, yet the other may charge him in an action on the case in a trover if he will.*" It has been uniformly held ever since that a wrongful taking under a claim of right is a conversion. *Beckwith v. Elsey*, Clayt. 112; *Metcalf's Case*, Clayt. 113; *Bruen v. Roe*, 1 Sid. 264; *Crossier v. Ogleby*, 1 Stra. 60; *Norman v. Bell*, 2 B. & Ad. 190; *Tear v. Freebody*, 4 C. B. N. S. 228; *Moody v. Whitney*, 34 Me. 563; *Nelson v. Burt*, 15 Mass. 204; *Cummings v. Perham*, 1 Metc. 555; *Phillips v. Bowers*, 7 Gray, 21; *Coughlin v. Ball*, 4 All. 334; *Johnson v. G. T. R. R. Co.*, 44 N. H. 626; *Davis v. Flemming*, 1 McCord, 213; *Childress v. Ford*, 1 Heisk. 463; *Weymouth v. R. R. Co.*, 17 Wis. 550. — ED.

<sup>2</sup> The argument for the plaintiff is slightly abridged. — ED.

General objected that trover did not lie for these goods (for that the seizure of them, and putting them into the custom-house warehouse, could not be said to be any conversion to his own use), but trespass, or trespass upon the case; and Mr. Attorney insisting upon a special verdict, and the Chief Baron inclining to be of that opinion, "that trover would not lie," the plaintiff chose to be nonsuited. But this is no solemn determination.

LORD MANSFIELD said, Mr. Bunbury never meant that those cases should have been published; they are very loose notes.

Mr. Justice WILLES mentioned another case in Bunbury, p. 80, Trin. 1721 (*Israel v. Etheridge et al.*), where Baron Price said that it was now allowed and taken for law "that trover did not lie against an officer for seizing *absque probabili causa*, but trespass would." Baron Montague was of opinion "that neither trover nor trespass would lie, because the seizure is not *contra pacem*; but that trespass upon the case, setting forth that the seizure was *absque probabili causa*, would lie." Baron Page was of opinion "that trespass, or case for the consequential damages, will lie."

*Mr. Dunning*, for the defendants, remarked upon the case last cited, that it appeared by it that the three barons, Price, Montague, and Page, all concurred in the opinion "that trover would not lie."

LORD MANSFIELD. It is a very loose note. It makes Baron Montague say "that trespass would not lie."

Mr. Justice WILLES mentioned the case of *Kenicot v. Bogan*,<sup>1</sup> which was trover and conversion of two tuns of wine, taken for prisage.

LORD MANSFIELD, who tried the present cause, said he saved this point upon the cases cited out of Bunbury by the counsel for the defendants; but nothing is clearer than "that trover lies." It is a wrongful conversion, let the property be in whom it will.

The case of *Chapman v. Lamb*<sup>2</sup> was mentioned by Mr. Wallace; which was subsequent to the others, being in Michaelmas term, 6 Geo. II. It was trover against a custom-house officer for fourteen shirts, a night gown and cap, seized for non-payment of duty, which were stated negatively "not to be imported as merchandise." The plaintiff had judgment, without any objection to its being an action of trover.

The court ordered the *postea* be delivered to the plaintiff.<sup>3</sup>

<sup>1</sup> Yelv. 198.

<sup>2</sup> 2 Stra. 943.

\* By reference to *Basset v. Maynard*, *supra*, p. 273 n., it appears that about the beginning of the seventeenth century trover became concurrent with trespass for a taking analogous to a disseisin of land. Originally even trespass could not be maintained except for such a taking. 3 Harv. L. Rev. 31. Replevin was anciently the exclusive remedy for a wrongful distress. But for a long time before the principal case it had been conceded that trespass would lie against a wrongful distrainer. A distress, however, even after trespass became concurrent with replevin, was not regarded as a conversion. *Dee v. Bacon*, Cro. El. 433; *Saltor v. Butler*, Noy, 46; *Agard v. Lisle*, Hutt. 10. The cases in Bunbury, cited in *Tinkler v. Poole*, simply followed the precedents; and the significance of the principal case lies in this, that it was an uncon-

## JOHNSON AND ANOTHER v. FARR.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1880.

[Reported in 60 New Hampshire Reports, 426.]

TROVER, for a lot of last-blocks. Facts found by a referee. The defendant attached the blocks as the property of one Howe, August 21, 1878, on a writ in favor of A. T. & O. F. Barron against said Howe, which is made a part of the case. Judgment was rendered in that action November 14, 1879, and execution issued thereon, but was never put into the hands of the defendant, or any other sheriff, for levy.<sup>1</sup>

*W. & H. Heywood and Ladd & Fletcher*, for the plaintiffs.

*Ray, Drew & Jordan*, for the defendant.

BLODGETT, J. It is stated in his return on the writ, and it is also found as a fact by the referee, that the defendant attached the blocks in question; and as against him, at least, it is to be presumed that the attachment was valid.

To constitute a valid attachment of personal property, it must be taken into the possession or be placed under the control of the officer. *Odiorne v. Colley*,<sup>2</sup> *Huntington v. Blaisdell*,<sup>3</sup> *Dunklee v. Fales*,<sup>4</sup> *Scott v. Print Works*.<sup>5</sup> Hence, it is to be assumed that the defendant took possession of these blocks, or placed them under his control; and if he did, it follows that to the extent of his possession and dominion the plaintiffs were necessarily excluded and divested. And we see no reason why such exclusion was not total; for the only object of an attachment of movable property being to take the property attached out of the possession and custody of the alleged debtor and transfer it to the possession and custody of the law, acting through its officer, he must, as against the debtor, be vested with the exclusive possession or custody of such property by the attachment, or its sole object would be defeated; and, moreover, it is a self-evident proposition, that neither the actual custody nor exclusive control in the same thing can at the same time be vested in two distinct persons.

But upon the question of the maintenance of the action, the extent of the plaintiffs' exclusion is quite immaterial, and so, also, is the fact that the blocks were not removed; for it was enough to constitute a wrongful conversion, if the defendant assumed such control over the blocks, by a possession actual or constructive, as deprived the plaintiffs

conscious repetition for the action of trover of the process of development which had already taken place in the action of trespass. Ever since *Tinkler v. Poole* it has been agreed that trover would lie for a wrongful distress. *Shipwick v. Blanchard*, 6 T. R. 298; *Hardy v. Keeler*, 56 Ill. 152; *Hall v. Amos*, 5 Monr. 89; *Connah v. Hale*, 23 Wend. 462; *Reynolds v. Shuler*, 5 Cow. 323. — Ed.

<sup>1</sup> The statement of facts and the opinion are slightly abridged. — Ed.

<sup>2</sup> 2 N. H. 66.

<sup>3</sup> 2 N. H. 317.

<sup>4</sup> 5 N. H. 527, 528.

<sup>5</sup> 44 N. H. 508, per Bartlett, J.



of their dominion over them for any purpose. *Morse v. Hurd*,<sup>1</sup> *Bristol v. Burt*, *Reynolds v. Shuler*,<sup>2</sup> *Wintringham v. Lafoy*,<sup>3</sup> *Woodbury v. Long*,<sup>4</sup> *Miller v. Baker*, *St. George v. O'Connell*,<sup>5</sup> *Tinker v. Morrill*,<sup>6</sup> *M'Combie v. Davies*; *Cool. Torts*, 448; 2 *Greenl. Evid.* 642; 6 *Wait Act. & Def.* 167. And that this was the necessary effect of the attachment is, we think, quite too plain for discussion.

*Exceptions overruled.*<sup>7</sup>

### BUSHEL v. MILLER.

AT NISI PRIUS, CORAM PRATT, C. J., NOVEMBER 21, 1718.

[Reported in 1 *Strange*, 128.]

UPON the Custom-house Quay there is a hut where particular porters put in small parcels of goods if the ship is not ready to receive them when they are brought upon the quay. The porters, who have a right in this hut, have each particular boxes or cupboards, and, as such, the defendant had one. The plaintiff, being one of the porters, put in goods belonging to A., and lays them so that the defendant could not get to his chest without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are lost. The plaintiff satisfies A. of the value of the goods, and brings trover against the defendant. And upon the trial two points were ruled by the Chief Justice:—

1. That the plaintiff, having made satisfaction to A. for the goods, had thereby acquired a sufficient property in them to maintain trover.

2. That there was no conversion in the defendant. The plaintiff by laying his goods where they obstructed the defendant from going to his chest was, in that respect, a wrong-doer. The defendant had a right

<sup>1</sup> 17 N. H. 246, 249.

<sup>2</sup> 5 Cow. 323, 325.

<sup>3</sup> 7 Cow. 735, 738.

<sup>4</sup> 8 Pick. 543, 545.

<sup>5</sup> 110 Mass. 475.

<sup>6</sup> 39 Vt. 480.

<sup>7</sup> *Abercrombie v. Bradford*, 16 Ala. 560; *Meade v. Smith*, 16 Conn. 346; *Woodbury v. Long*, 8 Pick. 543; *Blanchard v. Coolidge*, 22 Pick. 151; *Bowen v. Sanborn*, 1 All. 389; *McPartland v. Read*, 11 All. 231; *Woods v. Keyes*, 14 All. 236; *Dow v. Cheney*, 103 Mass. 181; *Howard v. Cooper*, 45 N. H. 339; *Farrington v. Payne*, 15 Johns. 431 *Accord*.

Similarly, a wrongful levy on final process is a conversion. *Smith v. Plomer*, 15 East, 607; *Goode v. Langley*, 7 B. & C. 26; *Glasspoole v. Young*, 9 B. & C. 696; *Stuart v. Phelps*, 39 Iowa, 14; *Prescott v. Wright*, 6 Mass. 20; *Matheny v. Johnson*, 9 Mo. 230; *Woodward v. Murray*, 18 Johns. 400; *Case v. Hart*, 11 Oh. 364; *Dargan v. Richardson*, *Dudley* (S. Ca.), 62.

But in no case will there be a conversion unless the officer takes the goods into his custody or control. For want of a change of possession, there was no conversion in *Mallalieu v. Laugher*, 3 C. & P. 551; *Herron v. Hughes*, 25 Cal. 555; *Rand v. Sargent*, 23 Me. 326; *Fernald v. Chase*, 37 Me. 289; *Bailey v. Adams*, 14 Wend. 201. — Ed.

to remove the goods, so that thus far he was in no fault. Then, as to the not returning the goods to the place where he found them; if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.

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## FORSDICK v. COLLINS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEBRUARY 13,  
1816.

[*Reported in 1 Starkie, 173.*]

TROVER for the value of a block of Portland stone.

The stone had been placed by the plaintiff on the land adjoining some shells of houses, which he had purchased in Hunter Street. The defendant, afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to Burton Crescent Mews.

*Puller*, for the defendant, contended that he had a right to remove it from his own premises.

LORD ELLENBOROUGH. But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged that he removed it to some adjacent place for the use of the owner; he could not have justified this removal.

*Puller* insisted that no sufficient demand had been proved.

LORD ELLENBOROUGH. A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance.

*Verdict for the plaintiff.*

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## FOULDES v. WILLOUGHBY.

IN THE EXCHEQUER, JUNE 1, 1841.

[*Reported in 8 Meeson & Welsby, 540.*]

TROVER for divers, to wit, two horses. Plea: Not guilty. The cause was tried before Maule, J., at the last spring assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey, from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had

paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages; against which rule

*W. H. Watson* and *Atherton* now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [LORD ABINGER, C. B. According to that argument, every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. In that case there is a user of the horse. LORD ABINGER, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a

few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow*,<sup>1</sup> it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing *Bishop v. Montague*.<sup>2</sup> [LORD ABINGER, C. B. I cannot agree to that position, at least to the extent for which it is now used.<sup>3</sup>]

*Crompton*, in support of the rule.<sup>4</sup>

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. / It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water,

<sup>1</sup> 2 Saund. 470.

<sup>2</sup> Cro. Eliz. 824.

<sup>3</sup> In the case cited, the beasts were taken absolutely by the defendant's bailiff as for a heriot due, the defendant afterwards agreeing to the taking and converting them. The court differed in opinion whether trover was maintainable, or whether the action should not have been trespass.

<sup>4</sup> The argument for the plaintiff is abridged, and that for the defendant omitted, as well as the concurring opinion of GURNEY, B., and a part of that of ROLFE, B. — ED.

and finding neither the owner or any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from *Strange's Reports*, of *Bushel v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-house Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really

would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all

times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is where a man does an act the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick v. Blanchard*,<sup>1</sup> that "in order to maintain trover the goods must be taken or detained with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it; namely, that the destruction of the goods will also amount to a conversion. For these reasons I think, in the case before us, the question ought to have been left to the jury to say whether the act done by the defendant of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, *i. e.*, with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

ROLFE, B. In every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative; for if the principle be that anything which controls the position of the chattel while in my possession, will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and under that impression led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into

an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushel v. Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio*; but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my Brother Gurney, that if the learned judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

*Rule absolute.*<sup>1</sup>

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TIMOTHY SHEA v. INHABITANTS OF MILFORD AND  
ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 6, 1888.

[Reported in 145 *Massachusetts Reports*, 525.]

W. ALLEN, J.<sup>2</sup> The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction, that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of

<sup>1</sup> *Trisconey v. Orr*, 49 Cal. 612; *Eldridge v. Adams*, 54 Barb. 417; *Jordan v. Greer*, 5 Sneed, 165 *Accord.* — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.



property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth v. Lowery*; <sup>1</sup> *Fouldes v. Willoughby*; <sup>2</sup> *Heald v. Carey*.<sup>3</sup>

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question.

*Exceptions overruled.*<sup>4</sup>

<sup>1</sup> 134 Mass. 512.

<sup>2</sup> 8 M. & W. 540.

<sup>3</sup> 11 C. B. 977.

<sup>4</sup> *Burgess v. Graffam*, *supra*, p. 125; *Farnsworth v. Lowery*, 134 Mass. 512; *Mattice v. Brinkman*, 74 Mich. 705; *Sparks v. Purdy*, 11 Mo. 219; *Roe v. Campbell*, 40 Hun, 49, 52 (*semble*) *Accord.* — ED.

SECTION II. (*continued*).

(d) DEFENDANT A PURCHASER, PLEDGEE, OR BAILEE OF A WRONGFUL TRANSFEROR.

## GALVIN v. BACON.

IN THE SUPREME JUDICIAL COURT, MAINE, JUNE TERM, 1833.

[*Reported in 11 Maine Reports, 28.*]

THIS was an action of replevin for a horse. On trial before Weston, Justice, it appeared that the horse was originally the property of the plaintiff. That the defendant bought him of one McAllister, he of one Scott, and Scott of one Staples, to whom the horse had been delivered by the plaintiff for use for a limited period and under the expectation of a purchase by Staples. The horse in question was delivered at each of these sales, and it was agreed that Scott, McAllister, and the defendant respectively, purchased *bona fide* for a valuable consideration, and without notice of any claim or interest in the plaintiff. There was no evidence that the plaintiff had made any demand on the defendant for the horse prior to the bringing of this action. Whereupon it was insisted that the plaintiff had failed to support the action. But with a view to have the jury pass upon the question of general property which was in controversy, the presiding judge ruled otherwise. The jury returned their verdict for the plaintiff. If, upon the foregoing ground, he had failed to make out a case, entitling him in the opinion of the court to retain it, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

A. G. Chandler, for the defendant.

Downes, for the plaintiff.<sup>1</sup>

The opinion of the court was delivered by

WESTON, J. Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. This is a principle uniformly applied in actions of trover. In *Gates v. Gates*,<sup>2</sup> and in *Seaver v. Dingley*,<sup>3</sup> the same rule is understood to apply in cases of replevin. In some other cases cited, as in *Hussey et al. v. Thornton et al.*,<sup>4</sup> and in *Marston v. Baldwin*,<sup>5</sup> this point does not appear to have been taken.

It is assumed in argument, on the part of the counsel for the defendant, that his possession was lawful, and that a demand was necessary by the plaintiff, to enable him to maintain replevin. And if his premises are correct, he is sustained in his position, by some of the

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> 15 Mass. 311.

<sup>4</sup> 4 Mass. 405.

<sup>3</sup> 4 Greenl. 306.

<sup>5</sup> 17 Mass. 606.

cases cited. The possession of the defendant did not subject him to the imputation of anything morally wrong. He acted in good faith, having purchased of one whom he supposed to have been the rightful owner; as did two others, who successively purchased and sold the horse in question. But their supposition did not accord with the fact. The horse was from the beginning the property of the plaintiff; and he had never authorized either of these sales.

Whoever takes the property of another, without his assent express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful, which is not justified or warranted by law; and of this character may be some acts, which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner; and he could convey none to another. The purchaser is not liable to be charged criminally; because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies, provided by law for the protection of property. If the bailee of property for a special purpose, sells it without right, the purchaser does not thereby acquire a lawful title or possession.

In the case before us, Staples was rightfully in possession of the horse, but he had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow, because his possession was rightful, that those who hold under him are also lawfully in possession. Indeed the very reverse is true. Staples had the horse by the assent of the owner; but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civiliter* to the true owner for the taking, as well as for the detention.

*Judgment on the verdict.*<sup>1</sup>

<sup>1</sup> It is generally agreed, as in the principal case, that an innocent purchase followed by the assumption of possession is a conversion without more, if the seller had no power to transfer the title. *Hurst v. Gwennap*, 2 Stark. 306; *Yates v. Carnsew*, 3 C. & P. 99; *Hilberry v. Hatton*, 2 H. & C. 822; *McNeill v. Arnold*, 17 Ark. 172; *Robinson v. McDonald*, 2 Ga. 116; *Bane v. Detrick*, 52 Ill. 19; *Chandler v. Ferguson*, 2 Bush, 163; *Galvin v. Bacon*, 11 Me. 28; *Whipple v. Gilpatrick*, 19 Me. 427; *Freeman v. Underwood*, 66 Me. 229; *Rodick v. Coburn*, 68 Me. 170; *Harker v. Dement*, 9 Gill, 7; *Riley v. Boston Co.*, 11 Cush. 11; *Chapman v. Cole*, 12 Gray, 141; *Gilmore v. Newton*, 9 All. 171; *Heckle v. Lurvey*, 101 Mass. 344; *Carter v. Kingman*, 103 Mass. 517; *Bearce v. Bowker*, 115 Mass. 129; *Trudo v. Anderson*, 10 Mich. 357; *Heberling v. Jaggar*, 47 Minn. 70; *Johnson v. White*, 21 Miss. 584; *Whitman Mining Co. v. Tritle*, 4 Nev. 494; *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v. Jones*, 30 N. H. 164; *Cooper v. Newman*, 45 N. H. 339; *Farley v. Lincoln*, 51 N. H. 577; *Surles v. Sweeney*, 11 Oreg. 21; *Carey v. Bright*, 58 Pa. 70; *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Buckmaster v. Mower*, 21 Vt. 204; *Courtis v. Cane*, 32 Vt. 232; *Deering v. Austin*, 34 Vt. 330; *Bucklin v. Beals*, 38 Vt. 653; *Oleson v.*

## THURSTON ET AL. v. BLANCHARD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1839.

[Reported in 22 *Pickering*, 18.]

TROVER to recover the value of certain goods alleged to have been obtained by the defendant from the plaintiffs by means of false and fraudulent pretences.

The trial was before Putnam, J. It appeared that the goods were purchased of the plaintiffs by the defendant, by means of false representations, on or about the 22d day of March, 1837, for the sum of \$677.77; that the defendant gave his negotiable promissory note for the amount, payable in six months; that such note had been in the possession of the plaintiffs ever since it was given; that they had never offered to give it up to the defendant; and that they had not made a demand upon him for the goods before commencing this suit. The plaintiffs, however, produced the note in court at the trial, and there offered to give it up, or to put it on the files of the court; but the defendant declined taking it, and it was placed on the files.

A verdict was taken for the plaintiffs by consent.

If the court should be of opinion that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.

*Choate* and *S. Parker*, for the defendant.<sup>1</sup>

*W. J. Hubbard* and *Watts*, for the plaintiffs.

SHAW, C. J., delivered the opinion of the court. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by

*Merrill*, 20 Wis. 462; *Eldred v. Oconto Co.*, 33 Wis. 133; *Beckwith v. Corral*, 2 C. & P. 261 *Accord*.

*Parker v. Middlebrook*, 24 Conn. 207; *Wood v. Cohen*, 6 Ind. 455 (but see *Rich v. Johnson*, 61 Ind. 246); *Stratton v. Allen*, 7 Minn. 502; *Storm v. Livingston*, 6 Johns. 44; *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 Hill, 613; *Gillet v. Roberts*, 57 N. Y. 28 (qualifying *Wooster v. Sherwood*, 25 N. Y. 278); *Millspaugh v. Mitchell*, 8 Barb. 333; *Tallman v. Turck*, 26 Barb. 167; *Twinam v. Stewart*, 4 Lans. 263; *Rawley v. Brown*, 18 Hun, 456; *Burckhalter v. Mitchell*, 27 S. Ca. 240; *Houston v. Dyche*, Meigs, 76; *Dunham v. Converse*, 28 Wis. 306 *Contra*.

In some New York cases a distinction is made by which the purchaser's receipt of a chattel upon the delivery of the wrongdoer is not a conversion, whereas his taking without such delivery is a conversion. *Ely v. Ehle*, 3 N. Y. 506; *Fuller v. Lewis*, 13 How. Pr. 219; *Cormier v. Batty*, 41 N. Y. Supr. Ct. 70. This distinction, it may be added, originated in a misconception of early Year-Book cases. Y. B. 2 Edw. IV. fol. 4, pl. 4, and Y. B. 21 Hen. VII. fol. 39, pl. 49. Even where this distinction obtains, the innocent receiver is guilty of a conversion without any demand, if he subsequently deals with the goods as owner, as by selling them and the like. *Pease v. Smith* 61 N. Y. 477.

<sup>1</sup> The arguments of counsel and a part of the case not relating to conversion are omitted. — Ed.

the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. *Buffinton v. Gerrish*.<sup>1</sup>

*Judgment on the verdict for the plaintiffs.*<sup>2</sup>

### M'COMBIE v. DAVIES.

IN THE KING'S BENCH, JUNE 21, 1805.

[Reported in 6 East, 538.]

IN trover for a certain quantity of tobacco, tried at the sittings after Michaelmas term, 1804, at Guildhall, before Lord Ellenborough, C. J.,

<sup>1</sup> 15 Mass. R. 156.

<sup>2</sup> *Ferguson v. Carrington*, 9 B. & C. 59 (*semble*); *Butters v. Haughwort*, 42 Ill. 18; *Farwell v. Hanchett*, 120 Ill. 573 (overruling *dictum* in *Moriarty v. Stofferan*, 89 Ill. 528); *Parrish v. Thurston*, 87 Ind. 437; *Stevens v. Austin*, 1 Met. 557; *Thayer v. Turner*, 8 Met. 550, 552; *Salisbury v. Gourgas*, 10 Met. 442; *Walker v. Davis*, 1 Gray, 506; *Carl v. McGonigal*, 58 Mich. 567; *Koch v. Lyon*, 82 Mich. 513; *Farley v. Lincoln*, 51 N. H. 577, 580, 581; *Moody v. Drown*, 58 N. H. 45; *Cary v. Hotailing*, 1 Hill, 311; *Ladd v. Moore*, 3 Sandf. 589; *Bowen v. Fenner*, 40 Barb. 383; *Solomon v. Van Praag*, 6 Hun, 529; *Yeager v. Wallace*, 57 Pa. 365; *Warner v. Vallily*, 13 R. I. 483; *Gage v. Epperson*, 2 Head, 669 *Accord*. But see, *per* PARKE, B., *Powell v. Hoyland*, 6 Ex. 71, 72: "We also think there was no evidence in the original transaction of any fraud committed by the defendant, so as to enable the plaintiff to recover upon that ground; that is, supposing that if the goods were obtained by fraud, an action of trespass would lie for taking them, which is a very doubtful matter. My impression is, it would not, because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

As the title passes to the fraudulent vendee, it seems clear that an innocent transferee, though a volunteer, is not guilty of a conversion in taking possession of the chattel transferred. *Goodwin v. Worthington*, 99 N. Y. 149; *Nat. Bank v. Hubbell*, 117 N. Y. 384, 398. But see, *contra*, *Farley v. Lincoln*, 51 N. H. 577.

For the same reason, a sheriff, innocently seizing the goods on legal process against the fraudulent vendee, is not thereby guilty of a conversion. *Thompson v. Rose*, 16 Conn. 71. But see, *contra*, *Farwell v. Hanchett*, 120 Ill. 573; *Bussing v. Rice*, 2 Cush. 48; *Acker v. Campbell*, 23 Wend. 372. Compare the analogous cases, *Nixon v. Jenkins*, 2 H. Bl. 135; *Billiter v. Young*, 6 E. & B. 1, 10; 8 H. L. C. 682; *Heilbut v. Nevill*, L. R. 5 C. P. 478; *Marks v. Feldman*, L. R. 5 Q. B. 278, 281. — ED.

the plaintiff was nonsuited, on the ground that there was no conversion by the defendant. A motion was made in Hilary term last to set aside the nonsuit and for a new trial, and the opinion of the court was reserved on the following facts: The plaintiff, a merchant in Aberdeen, had employed one Coddan, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase for him some tobacco, which Coddan accordingly did; and the tobacco in question was part of it. But the defendant had no knowledge of the transaction between the plaintiff and Coddan. Coddan, the broker, bought the tobacco in his own name whilst it was in the king's warehouse, and had it transferred to himself in his own name in the king's warehouse, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouse. Coddan, being in want of money, pledged the tobacco in his own name with the defendant for a sum of money, and transferred it into the defendant's name in the king's warehouse.<sup>1</sup> Afterwards an application was made to the defendant, on the part of the plaintiff, for a delivery of the tobacco in question. The defendant answered that he had advanced money to Coddan thereon; that he did not know M'Combie, and could not transfer it but to Coddan's order, and not till his advances were paid. On the 6th and 7th of November the following orders were addressed to the defendant. "B. A. — L 237, 649, 597, 659, 508.

"Mr. Davies, please to deliver to the order of Mr. Thomas M'Combie the above five hogsheads of tobacco, his property.

"Yours, &c.,

"Nov. 6, 1804.

J. R. CODDAN."

"Mr. Davies, I have to request you will immediately deliver to me five hogsheads of tobacco, marked and numbered, &c. (as before); the same being my property, placed in your hands by my broker, J. R. Coddan, whose order for their delivery I now hand you; and have to observe that if you do not deliver them over to me I shall be under the necessity of entering an action against you to enforce their delivery.

"Yours, &c.,

"London, 7th November.

T. M'COMBIE."

The defendant received the said orders, but said that he should not deliver the tobacco until he was paid the money he had advanced on them to Coddan. The tobacco still remains in the king's warehouse, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the defendant.

*W. Harrison*, for the plaintiff. The tobacco was as much in the defendant's possession while it remained in the king's warehouse as if it had been in the custody of a carrier or wharfinger; then his refusing to make the transfer, or give the order for delivering it, was a with-

<sup>1</sup> The Factors Acts would now protect a pledgee under similar circumstances. See *Cole v. N. W. Bank*, L. R. 10 C. P. 364, 367. — Ed.

holding of the tobacco from the rightful owner, and constitutes a conversion ; but at any rate the assuming any dominion over it, and taking it by the wrongful act of the broker, was a conversion.

LORD ELLENBOROUGH, C. J., said that the latter was the true ground to put the plaintiff's case upon ; and if the case had been so presented to him at the trial there would probably have been no nonsuit ; but it was put upon the ground that the not giving of an order for the delivery of the tobacco from the king's warehouse was in itself a conversion, in which I could not concur, not conceiving that the mere not doing of an act was a conversion. But taking the case higher up, upon principle, I think that the defendant's acts amount to a conversion. According to Lord Holt, in *Baldwin v. Cole*, the very assuming to one's self the property and right of disposing of another man's goods is a conversion, and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it ; for what is that but assisting that other in carrying his wrongful act into effect ?

The other judges assented, LAWRENCE and LE BLANC, JJ., observing, that when the defendant was afterwards informed of the plaintiff's rights, and the tobacco was demanded of him, he refused to deliver it.

*Rule absolute for setting aside the nonsuit and granting a new trial.*<sup>1</sup>

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### SPACKMAN AND ANOTHER v. FOSTER.

IN THE QUEEN'S BENCH DIVISION, APRIL 7, 1883.

[*Reported in 11 Queen's Bench Division, 99.*]

THIS was an action tried at the Cambridge Assizes on the 1st of February, 1883, to recover certain title-deeds.

At the trial it appeared that the plaintiffs were jointly entitled to certain land at Cottenham, in the county of Cambridge, the title-deeds of which were in their possession up to October, 1859. At that date John Spackman, a son of one of the plaintiffs, deposited the deeds without their knowledge with the defendant to secure an advance of £100.

GROVE, J.<sup>2</sup> This was an action brought by the two plaintiffs, who were owners of certain real property, to recover possession of their

<sup>1</sup> In *Krider v. Shaw*, 2 Mass. 398, and *Thacher v. Moors*, 134 Mass. 156, 167, as in the principal case, demand was made of the pledgee before action was brought. In *Hotchkiss v. Hunt*, 49 Me. 213 ; *Stanley v. Gaylord*, 1 Cush. 536, the pledgee was held guilty of a conversion without any demand, as he was also in *Hartop v. Hoare*, 2 Stra. 1187 ; *Daubigny v. Duval*, 5 T. R. 604 ; *Firemen's Co. v. Cochran*, 27 Ala. 228 ; in which cases it does not appear whether any demand was made before action brought. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

title-deeds. It appears that for a long time they had no occasion to refer to the title-deeds, but that when inquiry was made for them they were found to be in the possession of the defendant, of whom they were demanded, but who refused to give them up. An action was commenced to which the defendant pleaded the Statute of Limitations. The judge at the trial decided in favor of the plaintiffs that the statute had not run against them, but that they were entitled to the deeds, and they accordingly obtained judgment. Afterwards a rule to set aside that judgment was obtained on the ground that the claim was barred by the statute. Several points were raised in argument, but the only one material to our decision is whether the plaintiffs could have brought an action for the detention of the deeds without previously having demanded them. The defendant, when he received these deeds, had no knowledge that the person who pledged them had no title to them. He kept them as deposit<sup>ee</sup> or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion. The case most relied on for the defendant was *McCombie v. Davies*. The head-note of that case certainly appears to support the defendant's argument, but there is the great distinction that there was a demand and refusal. Lord Ellenborough says that assuming to oneself the property and right of disposing of another man's goods is a conversion, but that was not the case here, for all that the defendant assumed was the right of safe-keeping against the person depositing till the amount advanced should be repaid, but he did not in any other respect assume to himself the right of disposing of another man's goods which Lord Ellenborough said would amount to conversion. The other judges assented, but the ground of their opinion is added, "that when the defendant was afterwards informed of the plaintiff's rights and the tobacco was demanded of him, he refused to deliver it." On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds. Consequently the ruling of the learned judge at the trial was right, and this rule must be discharged.

*Rule discharged.*<sup>1</sup>

STEPHEN and DAY, JJ., concurred.

<sup>1</sup> *Leuthold v. Fairchild*, 35 Minn. 99 *Accord.* — ED.



## LORING v. MULCAHY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM, 1862.

[Reported in 3 Allen, 575.]

TORT for the conversion of goods which had been stolen from the plaintiff's shop, and carried to the defendant's house, with his knowledge, and left in his possession, and afterwards taken away and secreted by the same persons who carried them there. At the trial in the Superior Court, Putnam, J., instructed the jury that "if the defendant received these goods into his possession and control, knowing that they were stolen, or that they were not the property of the parties who brought them, and that they came unlawfully by them, it was a conversion by the defendant." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*W. P. Webster*, for the defendant. *L. H. Wakefield*, for the plaintiff.

METCALF, J. These exceptions must be sustained. On the evidence therein stated, the defendant did not convert the goods to his own use, but was a mere depository thereof, — a naked bailee. He did not assume to dispose of them as if they were his own, nor did he withhold them from the plaintiff on his demand. *Non constat* that he would not readily have restored them to the plaintiff if he had been required so to do. It does not appear that he had any intention to conceal the property from the owner, or that he made any agreement with the bailors to secrete it. In *Simmons v. Lillystone*, Baron Parke says: "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." See also *Polley v. Lenox Iron Works*, and cases there cited; *Fouldes v. Willoughby*. If, on the evidence in this case and the instructions given to the jury, the defendant was rightly found guilty of converting the goods to his own use, then would an inn-keeper, who should receive into his stable a horse that he knew to be stolen, and should permit the person who brought him there to take him away, be guilty of converting the horse to his own use.

*Exceptions sustained.*

## LEONARD v. TIDD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1841.

[Reported in 3 Metcalf, 6.]

WILDE, J.<sup>1</sup> The only question in this case is, whether the facts proved at the trial do in law constitute a conversion, as charged in the writ. The case is trover for the conversion of a gun, which the defendants admit was the property of the plaintiffs. It was proved that one Jerry Leonard, being indebted to the defendants, delivered the gun to them as security for the debt, and that afterwards the plaintiffs demanded the gun of one of the defendants. But the plaintiffs do not rely on this demand as evidence of a conversion; as the gun, before the demand, had been taken away by said Jerry, with the defendants' consent, and had been sold by him to one Pratt. The only evidence relied on to prove a conversion by the defendants, is the proof that this sale was made with their consent. It was proved that the bargain for the gun was made between the said Jerry and Pratt, and that Pratt agreed to purchase the gun for the sum of five dollars, to be paid to the defendants, if they would consent to take him as paymaster; to which the defendants assented. There was no proof that the defendants had any knowledge that the gun was the plaintiffs' property, or any reason to suppose that it was not the property of Jerry. But it was ruled by the court that this sale, with the permission of the defendants, would be a conversion by them, although they supposed that the gun belonged to Jerry at the time. It is now contended by the plaintiffs' counsel, that the jury had a right to infer from the evidence that the defendants joined in the sale; but we think no such inference can be made; and it is not to be supposed that it was made by the jury. For it was ruled by the court that the assent to the sale by the defendants, and their agreeing to receive the purchase-money, would amount to a conversion. The only evidence against the defendants was, that they received the gun as a pledge from Jerry, and afterwards restored it to him and took other security, and that the gun was sold by Jerry.

The receiving of the gun from the person who had the possession, and restoring it to him, under the circumstances proved, cannot be considered as a tortious act, and does not amount to a conversion.<sup>2</sup> We think, therefore, on the evidence reported, this action cannot be maintained.

*New trial ordered.*

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> Nat. Bank v. Rymill, 44 L. T. Rep. 767, *per* Bramwell, L. J.; Nelson v. Iverson, 17 Ala. 216; Marks v. Robinson, 82 Ala. 69, 83; Hudmon v. Dubose, 85 Ala. 446, 448; Hill v. Hayes, 38 Conn. 532; Parker v. Lombard, 100 Mass. 405 *Accord*.

See Rembaugh v. Phipps, 75 Mo. 422.

In Hudmon v. Dubose, *supra*, the defendant, a warehouseman, acting in good faith, received goods on storage from one who had no right to make the bailment, and

## THOMAS P. FROME v. ANDREW J. DENNIS.

IN THE SUPREME COURT, NEW JERSEY, NOVEMBER, 1883.

[Reported in 45 New Jersey Reports, 515.]

THE opinion of the court was delivered by

DIXON, J.<sup>1</sup> In August, 1879, the plaintiff left his plough on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plough still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plough of Hibler to plough a field, supposing the plough to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plough which he had used, and demanded of him pay for the use and the return of the plough or its value, and the defendant not complying, the plaintiff brought an action of trover for the plough. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plough. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

In order to maintain an action of trover, it is necessary to prove a conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams*,<sup>2</sup> in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

This subject has quite recently received considerable discussion in the Exchequer Chamber and House of Lords of England, in *Fowler v. Hollins*. The facts upon which the court finally settled as the basis of

subsequently delivered them to the holder of the warehouse receipt to whom the bailor had transferred it. This delivery was held to be a conversion; *Somerville, J.*, saying: "It is insisted in argument, that such shipment is legally tantamount to restoring the cotton to the possession of the bailor. The rule, in our judgment, cannot be construed to go this far. The exception in question only embraces the act of restoring the thing bailed to the mere possession of the bailor, — a substantial restoration of the original *status in quo* of the property. It does not include a restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach. And such is the act of conversion here imputed to the appellants." See, however, *Parker v. Lombard*, *supra*. — ED.

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 11 Vroom, 417.

decision, made the case a plain one of conversion. They were, that one Bayley had fraudulently come into possession of thirteen bales of cotton belonging to the plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Michols & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter, and in examining the goods, receiving them from Bayley and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised, whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice Brett, in both tribunals, and he insisted, with great force and clearness, upon a negative response. Byles, J., and Kelly, C. B., expressly concurred in this opinion, and the other judges in the Exchequer Chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the House of Lords, Mr. Justice Blackburn expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls & Co. that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody. He concedes, moreover, that this is not the extreme limit of the "excuse, and doubts whether it would be a conversion for a miller to grind grain into flour and return the flour to the person who brought the grain, before he heard of the true owner. Under the definition of Mr. Justice Depue, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron Cleasby, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view, that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an inde-

pendent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice Grove advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron Amphlett concurred with Brett; Lord Chelmsford, Chancellor Cairns, Lords Hatherley and O'Hagan advised for the plaintiff in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i. e.*, ownership over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In a very late case in Massachusetts, *Spooner v. Manchester*, a similar view is expressed. . . .<sup>1</sup>

To the same effect is *Laverty v. Snethen*.<sup>2</sup>

In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plough. He received it for a temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plough to the plaintiff on demand, was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not *refuse* to deliver, but could not. *Ross v. Johnson*; *Salt Springs Bank v. Wheeler*; \* *Magnin v. Dinsmore*.<sup>4</sup>

The judgment below should be reversed.

<sup>1</sup> The learned judge here gave a long extract from the opinion of Field, J., *infra*, p. 300. — ED.

<sup>2</sup> 68 N. Y. 522.

<sup>3</sup> 48 N. Y. 492.

<sup>4</sup> 70 N. Y. 410.

SECTION II. (*continued.*)

(c) MISFEASANCE BY BAILEE.

## POWELL v. SADLER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS AFTER  
EASTER TERM, 1806.[Reported in *Paley, Principal and Agent* (3d edition), 80.]

TROVER for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following sale day; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "it was a mistake of his clerk, for which he was not answerable." *Garrow*, for the defendant, insisted that there was no evidence of a conversion. LORD ELLENBOROUGH, C. J. I am of opinion that a conversion has been proved; the horses were intrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; "as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion."<sup>1</sup>

<sup>1</sup> *Loeschman v. Machin*, 2 Stark. 311; *Samuel v. Morris*, 6 C. & P. 620; *Cooper v. Willomatt*, 1 C. B. 672; *Van Amringe v. Peabody*, 1 Mason, 440; *Blakeley v. Rudell*, Hempst. 18; *St. John v. O'Connell*, 7 Port. 466; *Robinson v. Hartridge*, 13 Fla. 501; *Yeldell v. Shinholster*, 15 Ga. 189; *Seago v. Pomeroy*, 46 Ga. 227; *Haas v. Damon*, 9 Iowa, 589; *White v. Wall*, 40 Me. 574; *Webber v. Davis*, 44 Me. 147; *Carpenter v. Hale*, 8 Gray, 157; *Simpson v. Carleton*, 1 All. 109; *Carroll v. McCleary*, 19 Mich. 93; *Johnston v. Whittemore*, 27 Mich. 463; *White v. Phelps*, 12 N. H. 382; *Murray v. Burling*, 10 Johns. 172; *Kennedy v. Strong*, 14 Johns. 128; *Chandler v. Belden*, 18 Johns. 157; *Bates v. Conkling*, 10 Wend. 389; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Campbell v. Parker*, 9 Bosw. 322; *Jaroslauski v. Saunderson*, 1 Daly, 232; *Covell v. Hill*, 6 N. Y. 374; *Boyce v. Brockway*, 31 N. Y. 490; *Scott v. Rogers*, 31 N. Y. 676; *Strong v. Nat. Mec. Bank Assoc.*, 45 N. Y. 718; *Pease v. Smith*, 61 N. Y. 477; *Laverty v. Snethen*, 68 N. Y. 522; *Comley v. Dazian*, 114 N. Y. 161; *Ogden v. Lathrop*, 35 N. Y. Superior Ct. R. 73; *Hope v. Lawrence*, 1 Hun, 317; *Carraway v. Burbank*, 1 Dev. 306; *Etter v. Bailey*, 8 Penn. 442; *Harris v. Saunders*, 2 Strobb. Eq. 370; *Garvin v. Luttrell*, 10 Humph. 16; *Ainsworth v. Bowen*, 9 Wis. 348; *Couillard v. Johnson*, 24 Wis. 533 *Accord.* *Conf. Downer v. Rowell*, 24 Vt. 343. — ED.

But a sale by an agent at a price other than that authorized by the principal is not a conversion. *Dufresne v. Hutchinson*, 3 Taunt. 117; *Marr v. Barrett*, 41 Me. 403 (*semble*); *Bissell v. Huntington*, 2 N. H. 142; *Cairnes v. Bleeker*, 12 Johns. 300; *Sarjeant v. Blunt*, 16 Johns. 74; *Lockwood v. Ball*, 1 Cow. 322, 329; *Laverty v. Snethen*, 68 N. Y. 522, 526; *Comley v. Dazian*, 114 N. Y. 161, 165, 166; *Libley v. Story*, 8 Vt. 15 *Accord.*

Compare *Palmer v. Jarmain*, 2 M. & W. 282; *Stierneland v. Holden*, 4 B. & C. 5; *Harris v. Schultz*, 40 Barb. 315.

A wrongful pledge is a conversion. *Stevens v. Ames*, 22 N. H. 568; *Nichols v. Gage*, 10 Oreg. 92. — ED.

## A. J. PERHAM AND ANOTHER v. CHARLES W. H. CONEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 19, 1875.

*[Reported in 117 Massachusetts Reports, 102.]*

TORT for negligence in the use of a horse and carriage hired by the defendant of the plaintiff; with a count for the conversion of the same.

The judge instructed the jury as follows: <sup>1</sup>—

“The burden of proof is upon the plaintiff to prove in order to recover one or the other of the following propositions:—

“1. If the plaintiffs and defendant made a contract, by which the defendant hired the plaintiffs’ horse and carriage for use in driving to and from Lynnfield only, and in violation of that contract; the defendant drove the plaintiff’s horse and carriage to Lynnfield and from thence several miles to Peabody, he became thereby responsible to the plaintiff for any injury to such horse and buggy in Peabody or while driving from Lynnfield to Peabody. Whether or not such injury was caused by any want of ordinary care or skill of the defendant in driving the horse and carriage from Lynnfield to Peabody, or in tying or managing the horse and carriage in Peabody, or by any insufficiency of the harness of said horse, or any physical infirmity, or want of docility of the horse, would be immaterial, as the defendant’s use of the horse and carriage, in driving beyond Lynnfield in violation of his contract, was a conversion of such horse and carriage, in the nature of an original unlawful taking of such horse and carriage, at the time of the defendant’s leaving Lynnfield, and such conversion caused the defendant to be liable in damages to the plaintiff therefor, equal to the difference between the value of such horse and carriage at the time it was taken by the defendant from Lynnfield, and the value of the same when restored by the defendant to the plaintiff. Accepting pay for the use of the horse under such a contract was a waiver of the conversion.

“2. If the plaintiffs and the defendant made a contract by which the defendant hired the plaintiffs’ horse and carriage for use in driving for pleasure for a time and distance not fixed or agreed upon by them, the defendant rightfully drove the horse to Lynnfield and thence to Peabody, and was responsible to the plaintiff for any injury to such horse or carriage, which was caused by the defendant’s want of ordinary care and skill in driving or managing such horse and carriage in Peabody to be determined in view of the fact known by the plaintiffs, and presumed to have been considered by them in letting the horse, that the defendant was a one-armed man; but was not responsible for any injury to such horse and carriage caused by the insufficiency of the plaintiffs’ harness for driving or tying the horse, or by reason of any disease, or

<sup>1</sup> Certain instructions requested by the defendant, but refused, are omitted, as well as the arguments of counsel and a statement of the evidence. — Ed.

physical infirmity, or want of docility of the horse, or by any peculiar habits or dispositions of the horse when tied, unless the defendant was notified of such peculiar habits and dispositions."

The jury found for the plaintiffs, and to the rulings and refusals to rule as requested the defendant alleged exceptions.

*A. V. Lynde*, for the defendant.

*C. W. Eaton* and *S. K. Hamilton*, for the plaintiffs.

BY THE COURT. The instructions given were in accordance with the law as settled in the cases cited by the counsel on both sides, and accurately and sufficiently covered all the questions at issue. The first paragraph of the instructions applied to the count for a conversion of the horse, and the second to the count for negligence.

*Exceptions overruled.*<sup>1</sup>

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## R. L. SPOONER v. ANDREW J. MANCHESTER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPT. 7, 1882.

[Reported in 133 *Massachusetts Reports*, 270.]

FIELD, J.<sup>2</sup> This case apparently falls within the decision in *Hall v. Corcoran*,<sup>3</sup> except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after traveling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due

<sup>1</sup> *Hooks v. Smith*, 18 Ala. 338; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Frost v. Plumb*, 40 Conn. 111; *Mayor v. Howard*, 6 Ga. 219; *Phillips v. Brigham*, 26 Ga. 617; *Kelly v. White*, 17 B. Monr. 131; *Ripley v. Dolbier*, 18 Me. 382; *Morton v. Gloster*, 46 Me. 520; *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, 107 Mass. 251; *Fisher v. Kyle*, 27 Mich. 454; *Woodman v. Hubbard*, 25 N. H. 67; *Beach v. R. R. Co.*, 37 N. Y. 457; *Roe v. Campbell*, 40 Hun, 49, 52; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Sm. 397; *Angus v. Dickerson*, Meigs, 459; *Horsely v. Branch*, 1 Humph. 199; *Mullen v. Ensley*, 8 Humph. 428; *Price v. Allen*, 9 Humph. 703; *Bell v. Cummings*, 3 Sneed, 275; *Rice v. Clark*, 8 Vt. 109; *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Vt. 355; *Spencer v. Pilcher*, 8 Leigh, 565; *Harvey v. Epes*, 12 Gratt. 153 *Accord.* — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

<sup>3</sup> 107 Mass. 251.



care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion, is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. / Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes v. Willoughby* is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*; *Wilson v. McLaughlin*.<sup>1</sup>

It is argued that the act of the defendant in this case was a user of

<sup>1</sup> 107 Mass. 587.

the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*,<sup>1</sup> *Homer v. Thwing*,<sup>2</sup> *Lucas v. Trumbull*,<sup>3</sup> *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*,<sup>5</sup> a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

*Parker v. Lombard*<sup>6</sup> and *Loring v. Mulcahy* were both decided upon the ground that the defendant either assumed to dispose of the property as his own, or intended to withhold the property from the plaintiff.

*Nelson v. Whetmore*<sup>7</sup> was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*<sup>8</sup> the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *Wilson v. McLaughlin*,<sup>9</sup> *Nelson v. Merriam*,<sup>10</sup> *Houghton v. Butler*,<sup>11</sup> *Heald v. Carey*.<sup>12</sup>

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester, a longer distance than was contemplated, and on a different

<sup>1</sup> 5 Mass. 104.

<sup>4</sup> 107 Mass. 251.

<sup>7</sup> 1 Rich. 318.

<sup>10</sup> 4 Pick. 249.

<sup>2</sup> 3 Pick. 492.

<sup>5</sup> 8 Met. 548.

<sup>8</sup> 9 Allen, 171.

<sup>11</sup> 4 T. R. 364.

<sup>3</sup> 15 Gray, 306.

<sup>6</sup> 100 Mass. 405.

<sup>9</sup> 107 Mass. 587.

<sup>12</sup> 11 C. B. 977.

road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

*Exceptions sustained.*

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### JONATHAN WENTWORTH v. GEORGE A. McDUFFIE.

IN THE SUPREME COURT, NEW HAMPSHIRE, JUNE, 1869.

[Reported in 48 *New Hampshire Reports*, 402.]

SMITH, J. II.<sup>1</sup> The jury were instructed that "if the defendant wilfully and intentionally drove the mare at such an immoderate and violent rate of speed as seriously to endanger her life, and he was at the same time aware of the danger, and her death was caused thereby, it would be such a tortious act as would amount to a conversion, and trover might be maintained; though it would be otherwise if the fast driving was the result of mere negligence and want of discretion, he not being aware that it endangered the safety or life of the mare."

Two established principles of the law of trover tend to support this instruction. The first is the settled rule in this State, that if the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer. *Woodman v. Hubbard*.<sup>2</sup> This doctrine does not seem to proceed upon the idea that the driving the horse beyond the place named in the contract is conclusive evidence of the bailee's intention to convert the animal to his own use, but rather upon the ground that such use of the property is so substantial an invasion of the owner's rights, and so inconsistent

<sup>1</sup> Only the opinion of the court on the second point is given. — Ed.

<sup>2</sup> 25 N. H. 67.

with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby or to his proceeding against the bailee for a conversion. "A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property." Perley, J.<sup>1</sup> It has been said that, "if the thing be put to a different use from that for which it was bailed," the bailor may maintain trespass or trover, but that "any misuser or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee." Redfield, J., in *Swift v. Mosely*.<sup>2</sup> But we are unable to perceive any just ground for the distinction as stated in these broad terms. If a horse is hired upon the usual implied contract that he is to be driven at a safe rate of speed, the act of the bailee in wilfully and intentionally driving the horse at such an immoderate rate of speed as he knew would seriously endanger the life of the horse is at least as marked an assumption of ownership and as substantial an invasion of the bailor's right of property as the act of driving the horse at a moderate speed one mile beyond the place named in the contract of hiring. The probability of injury to the horse is much greater in the former case, and the cruel treatment of the horse is certainly as inconsistent with the continued existence of the contract of bailment as the use of the horse for a different journey.

The other established principle which tends to support this instruction is the doctrine that the wilful destruction by the bailee of the thing bailed is a conversion. See *Morse v. Crawford*.<sup>3</sup> If the death of the mare was caused by an act wilfully and intentionally done by the bailee with knowledge on his part that the life of the mare was thereby seriously endangered, we think that, so far as the civil remedy is concerned, the bailee may be regarded as having wilfully destroyed the mare. If the property is destroyed by the bailee's wilful act the bailor's right to maintain trover cannot depend upon the time when the destruction is consummated. "It can make no difference whether the destruction takes place immediately on the commission of the act, or is the necessary result of it." If the bailor had seen that his mare was about to be destroyed by the bailee's wilful act he would have been entitled to terminate the bailment, and retake his property if he could do it without force. When the bailor learns that an act has already been done which will result in the death of the mare, can he not elect to consider the bailment as having been rescinded by the act at the moment of its commission?

It may be urged that the principles referred to as sustaining the instructions are themselves arbitrary exceptions engrafted on the law of trover, and that they therefore do not furnish a foundation upon which to reason from analogy. If we are to look merely to the form of the declaration, very few of the actions of trover now brought would be

<sup>1</sup> 25 N. H. p. 71.

<sup>2</sup> 10 Vt. 208, p. 10.

<sup>3</sup> 17 Vt. 499.

sustained. The legal fictions which prevail in reference to trover are based upon authority; and however arbitrary the established principles may be, we know of no other test by which to decide any question pertaining to the form of action which has not already been conclusively settled by authority.

The right of a bailor to maintain trespass or trover against a bailee in a case like that supposed in the instructions is a question not conclusively settled by authorities directly in point. *Rotch v. Hawes*<sup>1</sup> seems favorable to the defendant. *McNeill v. Brooks*<sup>2</sup> is cited on the same side, but an examination of the opinion shows that the court did not have in mind such a wilful and intentional misuse as that described in the instructions given in the present case. *Swift v. Moseley*<sup>3</sup> contains a *dictum* favorable to the defendant, but the case itself is not in point; see also Harris, J., in *Parker v. Thompson*.<sup>4</sup> On the other hand, *Maguyer v. Hawthorn*<sup>5</sup> tends to sustain the plaintiff; as do also *Campbell v. Stakes*,<sup>6</sup> and *Nelson v. Bondurant*,<sup>7</sup> reaffirmed in *Hall v. Goodson*;<sup>8</sup> see also *James v. Carper*.<sup>9</sup> We think the instructions were correct.

*Judgment on the verdict.*<sup>10</sup>

## YOUL v. HARBOTTLE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 7, 1791.

[Reported in 1 *Peake*, 49.]

TROVER for goods. The plaintiff had put the goods in question on board the defendant's packet-boat, to be carried from London to Gravesend. Another person coming to the defendant's house, and saying that these goods belonged to him, the defendant, under a mistake, delivered them to him.

*Mingay*, for the defendant, objected that upon this evidence the plaintiff must be nonsuited. Here was no evidence of a conversion; and though the defendant was liable to a special action on the case, yet trover could not be supported.

*Erskine* relied on the case of *Syeds and Another v. Hay*,<sup>11</sup> determined

<sup>1</sup> 12 Pick. 136.

<sup>2</sup> 1 Yerger, 73.

<sup>3</sup> 10 Vt. 208.

<sup>4</sup> 5 Sneed, 349, p. 352.

<sup>5</sup> 2 Harrington, 71.

<sup>6</sup> 2 Wend. 137.

<sup>7</sup> 26 Ala. 341.

<sup>8</sup> 32 Ala. 277.

<sup>9</sup> 4 Sneed, 397.

<sup>10</sup> *Nelson v. Bondurant*, 26 Ala. 341; *Hall v. Goodson*, 32 Ala. 277; *Maguyer v. Hawthorn*, 2 Harrington, 71; *Campbell v. Stakes*, 2 Wend. 137 *Accord.*

*McNeill v. Brooks*, 1 Yerg. 73 (*semble*); *Parker v. Thompson*, 5 Sneed, 349 (*semble*); *Swift v. Moseley*, 10 Vt. 208 (*semble*) *Contra.* — ED.

<sup>11</sup> 4 T. R. 260.

last term, which, he said, showed this act of the defendant to be a conversion.

LORD KENTON. That case was determined on such peculiar circumstances, that it is hardly possible it should ever apply as an authority in a case not exactly parallel with it. I agree that when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained. *Verdict for plaintiff.*

### DEVEREUX v. BARCLAY.

IN THE KING'S BENCH, JUNE 16, 1819.

[Reported in 2 Barnewall & Alderson, 702.]

TROVER for oil. Plea: Not guilty. At the trial at the adjourned sittings before last Hilary term at Guildhall, before Abbott, C. J., the plaintiffs proved a purchase of four ~~tuns~~ of sperm oil, then lying at the defendants' warehouses, from a person of the name of Collinson. The following delivery order was given, dated 13th February, 1818:

"To Messrs. A. & W. BARCLAY, Leicester Square. — Please to deliver to the order of Messrs. Devereux and Lambert, the undermentioned goods (enumerating them). Charges from 27th February to be paid by Messrs. Devereux & Co. EDWARD COLLINSON."

Soon after this transaction, Collinson, who had in the mean time purchased from Mr. Gamon, a broker, without the defendants' knowledge some dark sperm oil of inferior value, then also lying at the defendants' warehouse, sold this latter quantity, about three ~~tuns~~, to a third person, and gave the following delivery order, dated 3d March, 1818: — "To Messrs. A. & H. Barclay. Please to deliver to Mr. Dale's carts my dark sperm oil." The defendants, not being aware that the two parcels of oil both belonged to Collinson, by mistake delivered the first parcel of oil to the second delivery order, the first delivery order not having been at that time presented to them by the plaintiffs. The plaintiffs, on the 28th March, presented their delivery order and demanded the oil. Abbott, C. J., being of opinion that this misdelivery, by mistake, did not amount to a conversion so as to entitle the plaintiffs to maintain trover, directed a nonsuit. A rule *nisi* for a new trial having been obtained,

*Scarlett* and *Manning* now showed cause.<sup>1</sup>

*Gurney* and *Jones*, contra, were stopped by the court.

ABBOTT, C. J. What effect the production of further evidence may have, the court cannot anticipate at present; it is quite sufficient to

<sup>1</sup> The argument for the defendant is omitted. — Ed.

say that this cause having been stopped too soon, the plaintiffs are entitled to a new trial. This is not the case of an innocent delivery, for it is one contrary to the knowledge which, in point of law, the defendants ought to have had. There is a great distinction between an omission and an act done. In the case cited from Burrow no act was done, and Lord Mansfield expressly said that it was a mere omission. But here there is an act done by the defendants, which, in its consequences, is injurious to the plaintiff. Upon this evidence, therefore, I am now of opinion that trover may be maintained.

BAYLEY, J. The case of *Youl v. Harbottle* shows that a carrier is liable in trover for a misdelivery. \*

HOLROYD and BEST, JJ., concurred.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> *Duffe v. Budd*, 3 B. & B. 177; *Syeds v. Hay*, 4 T. R. 260; *Mills v. Ball*, 2 B. & P. 457; *Lubbock v. Inglis*, 1 Stark. 104; *Stephenson v. Hart*, 4 Bing. 476; *Wyld v. Pickard*, 8 M. & W. 443; *Glyn v. E. L. Co.*, 5 Q. B. D. 129; *Bullard v. Young*, 3 Stew. 46; *Ala. Co. v. Kidd*, 35 Ala. 209; *Adams v. Blakenstein*, 2 Cal. 413; *Hanna v. Flint*, 14 Cal. 73; *Southern Co. v. Palmer*, 48 Ga. 94; *Ill. Co. v. Parks*, 54 Ill. 294; *Indianapolis Co. v. Herndon*, 81 Ill. 143; *Merch. Co. v. Merriam*, 111 Ind. 5; *Claffin v. Boston Co.*, 7 All. 341; *Odell v. Boston Co.*, 109 Mass. 50; *Jenkins v. Bacon*, 111 Mass. 373; *Newcomb v. Boston Co.*, 115 Mass. 230; *Alderman v. Eastern Co.*, 115 Mass. 233; *Libby v. Ingalls*, 124 Mass. 503; *Aborn v. Merchants Co.*, 135 Mass. 283; *Edwards v. Frank*, 40 Mich. 616; *Hicks v. Lyle*, 46 Mich. 488; *Gibbons v. Farwell*, 63 Mich. 344; *Smith v. Bell*, 9 Mo. 873; *Dufour v. Mephram*, 31 Mo. 577; *Ostrander v. Brown*, 15 Johns. 39; *Powell v. Myers*, 26 Wend. 591; *Lockwood v. Bull*, 1 Cow. 322; *Willard v. Bridge*, 4 Barb. 361; *Esmay v. Fanning*, 9 Barb. 176; *Coykendall v. Eaton*, 55 Barb. 188; *Guillaume v. Packet Co.*, 42 N. Y. 212; *Viner v. N. Y. Co.*, 50 N. Y. 23; *Price v. Oswego*, 50 N. Y. 213; *Bush v. Romer*, 2 Th. & C. 597; *Compton v. Shaw*, 3 Th. & C. 761; *Colgate v. Pa. Co.*, 31 Hun. 297; *Baltimore Co. v. O'Donnell* (Ohio, 1892), 32 N. E. R. 476; *Graves v. Smith*. 14 Wis. 5 *Accord*.

Compare *Heugh v. London Co.*, L. R. 5 Ex. 51; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *The Drew*, 15 Fed. Rep. 826; *Hills v. Snell*, 104 Mass. 173; *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merch. Co.*, 135 Mass. 283; *Wilson v. Adams Co.*, 27 Mo. Ap. 360, in which cases there was in fact no misdelivery.

As an original question there is great difficulty in treating a misdelivery by a carrier, by mistake, as a conversion. There is certainly much force in the following observations of Martin, B., in *Crouch v. Great North. Co.*, 11 Ex. 742, 757. "If the question of an action of trover against a carrier for misdelivery were to be considered now, for the first time, the courts would probably hold, that trover was not maintainable. In *Fouldes v. Willoughby*, 8 M. & W. 810, the subject of conversion, and the right to maintain trover, is dealt with, and the law is laid down by this court in a way which has been acted upon ever since, and most satisfactorily. I allude especially to the judgment of my Brother Alderson; and if his view be correct, as I believe it to be, it utterly excludes the case of misdelivery by a carrier as a conversion." — ED.

SECTION II. (*continued.*)

(f) DEFENDANT ACTING AS AGENT OR INTERMEDIARY.

PARKER AND ANOTHER v. GODIN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1728.

[*Reported in 2 Strange, 813.*]

SATUR, a bankrupt, at the time of his going off left some plate with his wife, who, in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. Woodward the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

PERKINS v. SMITH.

IN THE KING'S BENCH, TRINITY TERM, 1752.

[*Reported in 1 Wilson, 328.*]

IN trover, the jury find a special verdict, which, in substance, is shortly this: that upon the 22d of September, 1749, Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day; that the plaintiff is assignee under the commission; that upon the 23d of September, 1749, the defendant Smith, who is servant and riding-clerk to Mr. Garraway, to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money), and found it shut up; and that the bankrupt delivered to Smith the goods in the declaration, who gave a receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought against the servant Smith, who acted wholly in this matter for his master, and that the conversion is found to be to the use of his master, which is the



gist of an action of trover. After two arguments at the bar, the court gave judgment for the plaintiff.

LEE, C. J. The point is, whether the defendant is not a tortfeasor; for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.

Hughes, the bankrupt, had no right to deliver these goods to Smith; the gist of trover is the detainer or disposal of goods (which are the property of another) wrongfully; and it is found that the defendant himself disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in Smith, this disposal being his own tortious act; the act of selling the goods is the conversion, and whether to the use of himself or another it makes no difference. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master before or after the fact can excuse him.

The finding that the defendant disposed of the goods for his master's use is only the conclusion of the jury, and does not bind the court, the taking upon him to dispose of another's property is the tortious act, and the gist of this action.

*Judgment for the plaintiff per totam curiam.*

STEPHENS AND OTHERS, ASSIGNEES OF SPENSER AND ANOTHER,  
BANKRUPTS, v. ELWALL.

IN THE KING'S BENCH, JUNE 5, 1815.

[Reported in 4 Maule & Selwyn, 259.]

TROVER for goods. Plea: Not guilty. At the trial before Le Blanc, J., at the last Lancaster assizes, the case was this:—

The bankrupts, being possessed of the goods in question, sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. The learned judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict for the defendant. And upon a rule *nisi* obtained in the last term for a new trial, in order to question the accuracy of the learned judge's

direction in point of law, *Perkins v. Smith* was cited, and it was contended that the defendant being a tortfeasor, no authority that he could derive from his master would excuse him from being liable in this action.

*Park*, who now showed cause, referred to the report of *Perkins v. Smith*, in *Sayer*, 40, and said, that the decision went too far, and that it had not been approved of by *Lawrence, J.*, when cited to him on the western circuit, and he took this difference, that there the defendant received the goods with knowledge that the bankrupt had absconded and shut up shop. But in this case no demand was made until two years after the purchase; therefore it would be a great hardship if the defendant were to be liable in respect of a demand, which from the lapse of time it is impossible to comply with.

*Topping and Richardson*, contra.<sup>1</sup>

LORD ELLENBOROUGH, C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for *Heathcote* or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand. *Per Curiam. Rule absolute.*<sup>2</sup>

<sup>1</sup> The argument for the plaintiff is omitted. — ED.

<sup>2</sup> *Cranch v. White*, 1 B. N. C. 414; *Davies v. Vernon*, 6 Q. B. 443; *McEntire v. Potter*, 22 Q. B. D. 438; *Edgerly v. Whalan*, 106 Mass. 307; *Flanders v. Colby*, 28 N. H. 34; *Thorp v. Burling*, 11 Johns. 285; *Elmore v. Brooks*, 6 Heisk. 45 *Accord.* — ED.

## GREENWAY AND ANOTHER v. FISHER.

AT NISI PRIUS, CORAM ABBOTT, C. J., APRIL 20, 1824.

[Reported in 1 Carrington &amp; Payne, 190.]

TROVER for calico, which the plaintiffs had intrusted for sale to John and Henry Eccles, who had pledged it with the defendants for money lent.<sup>1</sup>

It appeared that one of the defendants, named Woodward, was a packer, who merely shipped the goods, and though he made affidavit at the custom-house that he was the real owner, yet it appeared that it was the common practice for packers to do so, they considering themselves to have a special property in the goods at the time of shipment.

On his part, therefore, it was submitted that he was not liable in an action of trover, inasmuch as he only acted in the regular discharge of his duty; and the work being done according to directions, no wrong in the transaction between other parties would affect him. If it were not so, every porter and every carrier would be liable, as well as a packer.

For the plaintiff it was replied: All persons who are parties to the conversion are liable. It is so in trespass. The question is, whether Woodward is or is not, by law, a party to the conversion. If the goods still remain the property of the plaintiffs, the packer is liable. It is clear that if a pipe of wine were obtained by a person and bottled off by his servant, and sent out, trover would lie against both. The case of *Stephens v. Elwall* was cited.

ABBOTT, C. J. On the part of Woodward reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and refusal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not liable.<sup>2</sup>

The fact of a pledge to the other defendants was made out to the satisfaction of the jury.

*Verdict for the plaintiffs against all except Woodward.*<sup>3</sup>

<sup>1</sup> A part of the case relating to evidence is omitted. — Ed.

<sup>2</sup> *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 648; *Gurley v. Armstead*, 148 Mass. 267; *Hanson v. Jacob*, 93 Mo. 331 *Accord.* — Ed.

<sup>3</sup> *Leuthold v. Fairchild*, 35 Minn. 99 (wheat-inspector innocently assisting the owner of an elevator in making a wrongful shipment; see also *Fern v. Leuthold*, 39 Minn. 212, 217) *Accord.*

See *Lee v. Bayes*, 18 C. B. 609, *per* Willes, J.; *Ganly v. Ledridge, Jr.* 10 C. L. 33, 40-41, 45, 46. — Ed.

## FRANCIS HOLLINS AND OTHERS, APPELLANTS, v. GEORGE FOWLER AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MAY 7, JULY 6, 1875.

[*Reported in Law Reports, 7 House of Lords, 757.*]

THIS was an appeal on a case stated, on which the Court of Queen's Bench had given judgment for Fowlers, the plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber.<sup>1</sup>

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs. Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed a purchase on his master's account. Messrs. Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as a broker for Thomas Seddon, of Bolton. The inquiries as to Mr. Seddon being quite satisfactory, Messrs. Rew forwarded to Fowlers, their principals, a sold note, in these terms: "Liverpool, Dec. 18, 1869. Messrs. Fowler Brothers. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales — American — at 12*d.*, per Minnesota," and the buyer's name was given thus: "Thomas Seddon, *per* H. K. Bayley." The payment was to be "cash within ten days, less 1½ per cent discount." A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs. Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. Rew sent to Bayley the following note: "Mr. Thomas Seddon, *per* Messrs. H. K. Bayley & Co. Bought from Fowler Brothers, *per* Rew & Freeman, brokers, 13 bales American cotton, *ex* Minnesota, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent discount."

On the 23d of December, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants), who consented to purchase the thirteen bales at 11½*d.* per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs. Hollins, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. Micholls, cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr. Micholls would be in Liverpool to purchase cotton through the Messrs. Hollins, and those gentlemen had bought

<sup>1</sup> Law Rep. 7 Q. B. 616.

the cotton from H. K. Bayley believing it to be of the sort which Messrs. Micholls would require. On examining the cotton, Mr. Micholls agreed to take it. Messrs. Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, Messrs. Hollins disposed of it to some other customer. In the latter part of the 23d of December, Bayley received a delivery order in these terms: "Please deliver the bearer . . . cotton, *ex* Minnesota, at 11½*d.* per lb., bought this day for Micholls & Co., Francis Hollins & Co." The thirteen bales were delivered on the following morning to Messrs. Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and portorage, the defendants, Messrs. Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs. Fowler, not having received payment for the cotton at the stipulated time (ten days), applied to Mr. Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs. Hollins for the bales of cotton, when the answer given was, "the cotton was bought by one of our spinners, Messrs. Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance." The action for trover was afterwards brought.

The cause was heard before Mr. Justice Willes, at the Liverpool Spring Assizes, 1870, when the facts above stated having been proved, the learned judge left two questions to the jury: first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice Willes then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion, and so the judgment of the court below stood affirmed.

This appeal was then brought.

The judges were summoned, and Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Brett, Mr. Baron Cleasby, Mr. Justice Grove, and Mr. Baron Amphlett, attended.<sup>1</sup>

*The Solicitor-General (Sir John Holker), and Mr. Herschell, Q. C.,* for the plaintiffs in error, defendants in the action.

<sup>1</sup> MELLOR, J., GROVE, J., and CLEASBY, B., concurred with BLACKBURN, J. AMPHLETT, B., agreed with BRETT, J. Their opinions are omitted, as well as the arguments of counsel. — Ed.

*Mr. Joseph Kay*, Q. C., and *Mr. Bigham* (*Mr. C. Russell*, Q. C., with them) for the defendants in error, plaintiffs in the action.

THE LORD CHANCELLOR proposed the following question to the judges:—

Whether, under the circumstances stated in the joint case on appeal, the respondents (the plaintiffs in the action) were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

BLACKBURN, J. My Lords, it appears from the statement in the case that Fowlers, the plaintiffs, had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, their property, they believing that they had sold these bales to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that Fowlers thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery.

Under such circumstances the property and legal right to the possession remained in Fowlers, and Bayley could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not intrusted by the plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon.

These points were decided, as I think rightly, in the case of *Hardman v. Booth*.<sup>1</sup>

From the terms of reservation (set out in the note to the report of the present case<sup>2</sup>), it appears that the defendant had an opportunity to have that case reviewed in a Court of Appeal, if so advised, for it is said that, "The defendants be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a *bona fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a court of co-ordinate jurisdiction, could not so hold; and the defendants have not raised the point for a Court of Appeal.

I proceed to state the farther facts.

Hollins, the defendants, as brokers, acting for Messrs. Micholls, and Messrs. Micholls, as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man, or, even a dishonest man, if intrusted by the plaintiffs with the possession of the goods, as an agent, for sale.

And the defendants and Micholls were both innocent of any knowl-

<sup>1</sup> H. & C. 802.

<sup>2</sup> Law Rep. 7 Q. B. 620.

edge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the defendants in dealing with Bayley without farther inquiry, nor, *a fortiori*, in Micholls who trusted the defendants to act for him, and dealt with Bayley because the defendants selected him.

Under those circumstances, your Lordships ask the question, whether the plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman v. Booth*,<sup>1</sup> is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs. See *Stephens v. Elwall* and *Garland v. Carlisle*.<sup>2</sup>

And, accordingly, I think it has not been disputed by any one, that if the plaintiffs had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants, Hollins, who honestly handed it to Bayley.

And I take it that if the defendants have done what amounts in law to a conversion, they also must be liable to pay the plaintiffs.

It is hard on them, I agree, but I do not think it is harder than it would have been on Micholls. Indeed, I think, that if the plaintiffs were told that they had recourse, at their option, against either the broker or the spinner, they might, without any obvious injustice, have said: Then make the broker pay, for he went to Bayley's, so that if there is any fault it is his.

But we cannot act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton-market at Liverpool equivalent to a sale in market overt, the loss would have fallen on the plaintiffs. As it is, it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a considerable extent by the Factors Acts, and it

<sup>1</sup> 1 H. & C. 803.

<sup>2</sup> 4 Cl. & F. 693.

may be expedient to extend that alteration farther, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, viz., whether what the defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my Brother Brett in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff, and some clear for the defendant, and that the difficulties arise in doubtful cases on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord Mansfield says, in *Cooper v. Chitty*:<sup>1</sup> "The bare defining of this kind of action and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods.

And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bona fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was

<sup>1</sup> 1 Burr. 20; 1 Sm. L. C. 417.



notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion; see *Isaac v. Clarke*,<sup>1</sup> *Vaughan v. Watt*. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And therefore it is no conversion if he *bona fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner; see *Heald v. Carey*,<sup>2</sup> *Alexander v. Southey*.

And the same principle would apply to the cases alluded to by my Brother Hannen in his judgment in the court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a care-taker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' bar. It was said: "Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?"

I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie*

<sup>1</sup> 1 Buls. 306, see p. 312.

<sup>2</sup> 11 C. B. 977.

an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge.

And on the same principle I take it the ruling of Lord Tenterden in *Greenway v. Fisher* may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord Tenterden on this ground, but on that of the packer's being a public employment, which I think my Brother Brett, in his judgment below, correctly shows to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or inn-keeper, bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In Comyns' Digest<sup>1</sup> it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion." *Per* Berkly, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or, suppose the plaintiffs in the case at your Lordships' bar had, for some reason, brought the action against Micholls' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavor to answer it. I think it is not necessary now to do so; for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my Brother Cleasby's judgment below, that the defendants themselves were the purchasers from Bayley, for though, if it were left to me to draw infer-

<sup>1</sup> Action on the Case — Trover, E.

ences of fact, I should draw that inference, I doubt if it is open to me so to do after the finding of the jury affirming that the defendants were agents. But though it is to be taken in favor of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material; see *Parker v. Godin*. There, "the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court, a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use."

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens v. Elwall*, where Lord Ellenborough says: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the defendant in *Stephens v. Elwall* can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover; see *Garland v. Carlisle*.<sup>1</sup> The Legislature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in market overt, and to persons dealing with agents intrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed by the Lord Chief Baron<sup>2</sup> that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law, as it exists, does not protect such brokers.

The conversion in the case of *Stephens v. Elwall* consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defend-

<sup>1</sup> 4 Cl. & F. 693.

<sup>2</sup> Law Rep. 7 Q. B. 641.

ant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought them from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord Ellenborough.

The conversion in the present case consists in, by means of the delivery order, transferring the goods from Bayley to Micholls with intent to transfer *de facto* Bayley's property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens v. Elwall* may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross v. Johnson*, cited by my Brother Brett, is not in point. There the defendant had received goods as plaintiff's warehousemen. They were lost, and the ruling of the court was, that though an action might lie for negligence, if there was any, there was no conversion.

The *Lancashire Wagon Company v. Fitzhugh*<sup>1</sup> was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiff's interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to plaintiffs' interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who uses the goods is, makes against the defendants.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

BRETT, J. In the judgment which in this case I delivered in the Exchequer Chamber, I endeavored to fix exactly the question which had to be determined. I did so because I thought, with deference, that it had been overlooked in the judgments given in the Court of Queen's Bench. I venture again to draw attention particularly to the same point, because I think it has been disregarded by some of the judges in the Exchequer Chamber. In the Queen's Bench, Mellor, J., says: "It is needless to consider now, whether if the defendant Hollins had expressly purchased these goods for Micholls, Lucas, & Co., he would have had a good defence to this action, because that point did not, in fact, arise. It would seem that these goods were bought on speculation, &c. Then, the defendant, being alone responsible to the seller, deals with the goods by selling them to a third party." Lush, J., says: "It is quite unnecessary to consider what the defendant's liability would have been if he had bought for a principal, because it is clear that he

bought on his own account and then sold the goods." Hannen, J., says: "This is not the case of a mere broker dealing with the goods in that character. For if Bayley had had the title in him to sell this commodity, the actual property in the goods would have been in the defendants." Each of the judges bases his decision on an interpretation of the evidence by which he concludes that Hollins bought as a principal from Bayley, and sold as a principal to Micholls & Co.

Martin, B., in the Exchequer Chamber, interprets the finding of the jury to mean "that cotton-brokers deal with cotton in the same manner as the defendants dealt with this cotton. For no man, he says, can doubt but that the defendants bought the goods as principals from Bayley; secondly, that they dealt with them only as agents to their principal. This finding is in my judgment immaterial; whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence." In another part, he says: "In one sense the finding was correct; I have no doubt the defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts show a sale by Bayley to the defendants, and a re-sale by them to Micholls & Co." This judgment either relies upon that last interpretation of the facts, or upon a proposition of law, that every agent who deals with another person's property, in the sense of having it in his possession for any other purpose than holding it for the true owner, is, by the mere fact of so doing, liable to the true owner in trover. Cleasby, B., founds his judgment on this: "It was therefore in this right, as the persons entitled to the possession of the cotton as buyers from Bayley, that the defendants obtained possession of it for the purpose of transferring the property in it to their principals, Micholls & Co., and this dealing with the property appears to be a clear conversion upon all the authorities. The defendants acted as brokers, but from the circumstances attending the contract they became themselves interested in it." This judgment seems to be founded on the view that the defendants became principals in the purchase of the cotton so as to buy as principals from Bayley and sell as principals to Micholls & Co. It is because all these judgments are founded upon the same interpretation of the evidence, and of the findings of the jury, that I venture, as I have said, to call particular attention to the direction of Willes, J., to the findings of the jury, and to the form of the leave reserved. They can be best understood by considering the course of business with which the judge and jury were dealing. What is that course of business?

Liverpool is the cotton mart for Lancashire and Yorkshire. A Liverpool cotton broker instructed to purchase makes contracts in Liverpool for the purchase of cotton by his clients in the country districts. He informs his country client of the completion of the contract by a bought note forwarded to him in the country. The cotton is at the time of the contract usually warehoused in Liverpool. If the cotton has been bought by sample, or according to one of the Liverpool known enumerations of kind or quality, the country client may desire to exercise an

opinion on the cotton purchased for him. If so, he requests the broker to obtain for him a bulk sample, which the broker does, and forwards it. Again, the country client does not require immediate delivery from the Liverpool warehouse; but when later he does, he requests his broker to forward the cotton. The broker then obtains or signs a delivery order, and by a carter receives delivery from the warehouse, and forwards the cotton to a Liverpool railway station. This is done generally after the broker has had many transactions in cotton passing through his hands for other clients. It is an addition to the more regular business of brokers, which Liverpool cotton brokers have undertaken. It was in order to test the legal effect of this new course of business, and the liability of the brokers who carry it on, in the case of the immediate seller, through them of the cotton, being fraudulent or unauthorized to sell the cotton, but such defect being unknown to the broker, that Willes, J., left two questions to a Liverpool special jury, first, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principals. When a question in the form of either of these is put to a jury, there is, of course, always the antithetical proposition, perfectly well understood by the jury, and the facts material to which are discussed by the judge in summing up the evidence. The real expansion, then, of the questions, as applied to the course of business and its effect, was, first, did the defendants make the contract as agents for principals, *i. e.*, acting merely as brokers to make a contract, or did they buy from one and sell to the other; and, secondly, did the defendants take and make delivery with reference to a contract between two parties, that is to say, with a view to bind the contract to specific goods, or to pass the property in goods from one party to the other, or were they simply acting as agents of a person to whom goods were assumed already to belong, to forward his own goods to him. The alternative propositions must have been just as much before the jury as the primary ones, expressly reported to the court by the judge. That this was the meaning intended by the judge and understood by the jury seems to me plain from the terms of the leave reserved, which are that the verdict may be entered for the plaintiffs, if the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton as having converted them to their own use. I venture to say and to press upon your Lordships that, upon such a reserved leave, which cannot be reserved without the consent of both parties to the suit to its terms, neither the Court of Queen's Bench, nor the judges in the Exchequer Chamber, had any right to put upon the questions, answer, or evidence, any other interpretation than that which is put by the leave reserved, and I venture to repeat that, otherwise, parties will not consent that leave should be reserved. Yet every one

of the judgments to which I have referred otherwise interprets both the questions and the evidence, and resolves that the evidence proved precisely the propositions which the jury negatived, and is inconsistent with the propositions which the jury affirmed. And far from agreeing with the learned judges who thus pronounce the verdict to be contrary to the evidence, I humbly agree with Willes, J., who was satisfied with the verdict, that in truth and in fact the verdict was right, that the defendants did make the contract for principals, and that in forwarding the cotton they had no question of property in their mind. If any property in this cotton could have passed, it would have passed by the contract, and not by the subsequent forwarding. It is impossible to my mind to suppose that Willes, J., could have reserved a question of law for the opinion of the court, if the questions left by him, or the evidence, could be interpreted as they have been in those judgments. To hold as the judges have held, is either to hold that the jurors have answered the questions wrongly, or that the questions were immaterial; in one case, that the verdict was against the evidence, in the other that Willes, J., notwithstanding the answers, ought to have directed the verdict to be entered for the plaintiffs, and therefore was guilty of misdirection. Yet the Court of Queen's Bench refused to grant a rule as for misdirection, or as for a verdict against evidence, and confined the discussion to whether the verdict should be entered for the plaintiffs on a count in trover, on the assumption, as I submit, that the interpretations put upon the questions of the judge and the answers of the jury, by the leave, are correct. I submit, therefore, that the very foundation of this case is that the defendants made the contract as agents and brokers only, and that they did not buy or sell as principals, and that in obtaining the sampling order and sample, and in obtaining or signing the delivery order, and in receiving and forwarding the cotton, they acted, so far as knowledge or recollection and intention went, merely as agents for Micholls, Lucas & Co., to examine for them, to receive for them, to forward to them, goods assumed at the time to be their goods without any reference to the contract by which the goods became theirs. The question of law is, whether such dealing with goods can lay a mere agent open to an action of trover. The question in business, and it is a most important one for Liverpool, is, whether the cotton brokers of Liverpool may with safety, so long as they do no more, add to their proper function of brokers the business of forwarding cotton to the Liverpool stations for their clients. If they may, it seems to be an addition to their business of mere brokers innocent as regards others, and convenient for them and their clients. If the brokers may not safely perform this small function of forwarding to the station, another agent must be introduced by the country principal to do it, to the great inconvenience of such principal.

The real question, which I cannot doubt it was the intention of Justice Willes to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to

the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interfere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron Martin and the other barons in the case of *Burroughes v. Bayne*. In that case Baron Martin says: "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Farther on he explains what he intends by this. He quotes from the judgment of Alderson, B., in *Fouldes v. Willoughby*, thus: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion." "I," says Martin, B., "entirely accede to this view of the law, which is simple and of easy application." It is obvious that Martin, B., took a very large view of the term "conversion." And that the question of the right interpretation of the term is very important, for upon it may depend whether a defendant is to be held liable in trover for the full value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes v. Bayne*, Channell, B., says: "I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favor of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having farther use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." Bramwell, B., says: "It certainly is not every detention of goods, although there is no right to detain them, that is a conversion, in my judgment at all events." Again: "The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." Again: "If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word 'conversion,' the defendant is made liable for the value of the



billiard table, which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff," &c. In the judgment in the Exchequer Chamber, Martin, B., repeated the same view of a conversion which he had stated in *Burroughes v. Bayne*: "But as regards the action of trover," he says, "I think it is well settled that the assumption and exercise of dominion — and asportation is an exercise of dominion — over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person." Now the greater part of the propositions thus enunciated by Martin, B., are identical with the propositions of the other judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsistent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to the possession of them of his dominion over them is a conversion, if by the word "dominion" in the last proposition is intended "title as owner." The essential difference between the view of Baron Martin and the other judges I have mentioned is in the sense in which this word "dominion" is used by him and them. When Baron Martin speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other judges mean an interference or dealing with, or doing some act in negation of, the title as owner, of the true owner. Baron Martin holds that every asportation or detention which cannot be justified, *i. e.*, which is not done for the true owner, is a conversion. Baron Channell and Baron Bramwell hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question in this case is, what is the proper definition of the term "conversion" in a case in which an asportation of the chattel is relied on as the conversion. If the first finding is to be treated as a binding decision that the defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgment below. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of Martin, B., is preferred to that of Barons Bramwell and Channell. It cannot fail to be observed that the definition of Martin, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and refusal; and that in order to meet the difficulty,

he, in his judgment in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway v. Fisher* is wrongly decided. I endeavored in the Exchequer Chamber to explain all the cases which are called exceptional, by showing that the definition of a conversion laid down by Bramwell and Channell, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much farther upon this point than I endeavored to do in that judgment, to which I beg to refer. In addition, however, I may say that in *Simmons v. Lillystone*, Parke, B., says: "Here the defendant never intended to take to himself any property in the timber," and, "We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." If the last phrase be expanded, it clearly means "or to deprive the plaintiff of the property in the goods." In *Chitty on Pleading*<sup>1</sup> it is said: "There may be a conversion, 1st, by wrongfully taking a personal chattel; 2dly, by some other illegal assumption of ownership, or by illegally using or misusing goods; or 3dly, by a wrongful detention." Looking to the phraseology of the second branch, which speaks of "some other assumption of ownership," it is obvious that the taking in the first branch is a taking as in right of ownership in the defendant, or in some one other than the plaintiff. In explaining the second branch, the learned author says: "So the wrongful assumption of the property in goods may be a conversion of itself, or the wrongful assumption of a right of disposing of them." And under the latter, he gives as instances a wrongful user of the goods, *i. e.*, I apprehend, a user as if the defendant or some one other than the plaintiff were the owner, and a misuser by the defendant, as by breaking bulk, or consuming, or transforming, which are all cases of the exercise of acts as of ownership. It seems apparent to me that a claim or exercise of ownership is throughout in the mind of the author as the reason of his producing the cases as examples of "actual conversion." And then he proceeds to the third head, and says: "A demand and refusal are necessary in all cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct 'actual conversion.'" That is to say, as it seems to me, that in order to prove a conversion, you must give evidence either of "an actual conversion," which consists in the defendant taking or using the goods with the intent to exercise an act of ownership on his own behalf, or of some one other than the plaintiff, or of a conversion by reason of a refusal on demand. I conclude, therefore, as before, that the defendant cannot be properly made liable in

<sup>1</sup> Vol. i. tit. *Trover*, p. 172, Ed. 1844.

trover on the first part of the leave reserved in this case, because he was acting only as a broker, to make a contract between other parties, and none with himself; nor on the second part of the leave reserved, because the court was bound to treat the asportation, which was relied on as an actual conversion, as a simple asportation made without intent to interfere in any manner with the title of or ownership in the cotton. I cannot agree with the view which seems to me to be expressed by Martin, B., in *Burroughes v. Bayne*, that the action of trover is equivalent to an action of trespass, and was invented in order to replace the action of detinue, avoiding only the right of the defendant to wage his law. I believe that it was invented in order to provide a remedy in damages, where there has been a trespass, and more than trespass to goods, namely, acts done with the intention of transferring or interfering with the title to or ownership of them, or which are done as acts of ownership of them, or where without an original trespass there have been acts done with the intention of transferring or interfering with the title to or ownership of them, or which have been done as acts of ownership of them. I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion. I answer your Lordships' question by saying that in my opinion the judgments in the Court of Queen's Bench and Exchequer Chamber ought to be reversed, and that judgment in the action ought to be entered for the defendants.

LORD CHELMSFORD.<sup>1</sup> My Lords, . . . I think that the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right, and ought to be affirmed.

*Judgment of the Court of Exchequer Chamber affirmed.*<sup>2</sup>

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WILLIAMS AND CHAPIN v. MERLE.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1833.

[Reported in 11 *Wendell*, 80.]

THIS was an action of trover, tried at the New York Circuit in October, 1831, before the Hon. Ogden Edwards, one of the circuit judges.

About the first of November, 1829, the master of a tow-boat took by mistake four barrels of potashes from the warehouse of the plaintiffs, who, and the owners of the tow-boat, occupied the same building in Albany. The master, on his arrival in New York, having discovered the mistake, delivered the articles to a clerk of the agents of his prin-

<sup>1</sup> THE LORD CHANCELLOR (LORD CAIRNS), LORD HATHERLEY, and LORD O'HAGAN concurred with LORD CHELMSFORD. The opinions of the four Lords are omitted. — ED.

<sup>2</sup> See *City Bank v. Babcock*, 1 Holmes C. C., 180, 184. — ED.

cipals, who said he would take the ashes to an inspector's office and advertise them. The clerk accordingly took them to an inspector's office on the 3d of November, obtained a certificate of inspection, and on the 6th of November sold the ashes to the defendant, a produce broker, who purchased them for a Mr. Paterson for a fair price, and received the inspector's certificate. On the 10th of November the defendant took the ashes from the inspector's office, and shipped them to the order of his principal. About the 1st of September, 1830, the plaintiffs demanded the ashes of the defendant, who refused to account for them, saying he had purchased and paid for them a year preceding the demand. The judge intimated his opinion that if the defendant had acquired the ashes *bona fide* by purchase in the regular course of his business as a broker, and had disposed of them *bona fide*, pursuant to the instructions of his principal before suit brought, that the action would not lie; he, however, refused to nonsuit the plaintiffs, and the jury, under his direction, found a verdict for the plaintiffs for the value of the ashes and the interest thereof, reserving the question as to the plaintiffs' right to recover, for the opinion of this court.

*S. Stevens*, for the plaintiffs. *C. Graham*, for the defendant.

By the Court, SAVAGE, C. J. The question is, whether the plaintiffs are entitled to recover upon the facts of this case. That they had title to the property does not admit of dispute. Has that title been transferred to the defendant, and in what manner? The owner of property cannot be divested of it but by his own consent, or by operation of law. Morgan, who took the property by mistake, certainly acquired no title. Shankland (the clerk) surely had no title. If the defendant has title, it comes to him from a person who had none. In the language of Mr. Justice Sutherland, in *Everett v. Coffin*,<sup>1</sup> "the disposing or assuming to dispose of another man's goods, without his authority, is the gist of this action; and it is no answer for the defendants that they acted under instructions from another, who had himself no authority." This same principle was asserted by this court in *Prescott v. Deforest*,<sup>2</sup> where it was held that a landlord who distrained and sold the goods of his tenant conveyed no title to the purchaser, the distress being unauthorized. The court said, that if Satterlee (the landlord) had no right to distrain and sell the goods, it necessarily follows that the defendant, though a *bona fide* purchaser for valuable consideration, acquired no title. So far, then, as the defendant's title depends upon the purchase by him in good faith, and for valuable consideration, it is still without foundation so long as the seller had neither title nor authority to sell. The owners were not in fault; the property was taken without their consent or knowledge. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity.<sup>3</sup>

The defendant stands in no better situation than any other who purchases an article from a party without title or authority to dispose

<sup>1</sup> 6 Wend. 609.

<sup>2</sup> 16 Johns. 159.

<sup>3</sup> A part of the case, not relating to conversion, is omitted. — Ed.

of such article; in such case the purchaser acquires no title. The true owner has a right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it.

The plaintiffs are therefore entitled to judgment upon the verdict.<sup>1</sup>

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CONSOLIDATED COMPANY v. CURTIS AND SON.

IN THE QUEEN'S BENCH<sup>\*</sup> DIVISION, MARCH 1, 1892.

[Reported in (1892) 1 *Queen's Bench*, 495.]

COLLINS, J., read the following judgment:<sup>2</sup> This is an action of trover by the grantees under a bill of sale of household furniture and effects against auctioneers who sold the same by order of the grantor, in ignorance of the existence of the bill of sale. Messrs. Curtis & Son, the defendants, received instructions in the ordinary course of business from the grantors to sell the goods in question by auction on the premises, No. 13, Seamoor Road, Westbourne, then in the occupation of the grantor, and which were not the premises where the goods were at the time of the bill of sale. Messrs. Curtis & Son prepared and circulated a catalogue which included not only the goods comprised in the bill of sale, but others belonging to other persons. The sale took place on June 18, 1891, and the goods in question were delivered to purchasers, as was admitted, in the ordinary course. "Ordinary course" was described by a witness called for the defendants — the only one called in the case — all other material facts being admitted between the parties. He was a valuer in the employ of the plaintiffs, and stated that he was very familiar with the course of business at auctions both at public sale-rooms and at private residences, having been obliged to attend at very many of them in his capacity as valuer, and also as having been formerly himself a clerk to an auctioneer, and having himself been charged with the duty of carrying out the delivery to purchasers. I admitted his evidence, subject to an objection from Mr. Foote that he was not competent. His evidence was that it was the duty and practice of the auctioneer in all cases to carry out the delivery, whether the sale takes place at a sale-room or at a private residence; he receives the deposit and the purchase-money, and on receipt gives orders to porters employed by him to assist in or effect the delivery. No delivery can be had without his receipt.

On these facts it was submitted on behalf of the plaintiff that a conversion by the defendants had been proved. On the other hand, Mr.

<sup>1</sup> 4 *Lee v. Mathews*, 10 Ala. 682 *Accord.*

But see *Hunt v. Kane*, 40 Barb. 638. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

Foote contended, chiefly on the authority of *Turner v. Hockey*,<sup>1</sup> that what his clients had done did not amount to a conversion. No alternative ground of claim was suggested, and the damages, if any, were agreed at £29 10s. In view of that case, which certainly at first sight seems to go the whole length of the defendants' position, I took time to look more fully into the authorities.

No doubt there is considerable difficulty in framing an exact and exhaustive definition of a conversion, and it is not easy to draw the line at the precise point where a dealing with goods by an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (*per* Martin, B., in *Burroughes v. Bayne*, and *per* Lord Mansfield, C. J., in *Cooper v. Chitty*<sup>2</sup>), and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by Blackburn, J., in his opinion given to the House of Lords in *Hollins v. Fowler*, which are consistent with the duty of a mere finder such as the safe guarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant. It may be, as suggested by Brett, J., in the same case, that the test is whether there is an intent to interfere in any manner with the title of or ownership in the chattel, not merely with the possession. The difficulty is, I think, rather in drawing the true inference from facts in particular cases than in grasping the principle. There are, however, happily many cases which fall clearly on one side or other of the line. It is clear that there can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or the possession: *Lancashire Wagon Co. v. Fitzhugh*,<sup>3</sup> and *per* Brett, J., in *Fowler v. Hollins*. *A fortiori*, mere intervention as broker or intermediary in a sale by others is not a conversion. This is the case put by Bramwell, L. J., in *Cochrane v. Rymill*<sup>4</sup> of an introduction by an auctioneer of a purchaser to a vendor. But, unless *Turner v. Hockey* decided the contrary, I should have thought it equally clear that a sale and delivery with intent to pass the property in chattels by a person who is not the true owner and has not got his authority is a conversion.

What, then, is the position of an auctioneer who sells and delivers in ordinary course? Is he a mere broker who negotiates a sale between two other persons, and then, as suggested by Brett, J., was the case in *Fowler v. Hollins*, acts only as forwarding agent "without any actual intention with regard to, or any consideration of, the property

<sup>1</sup> 56 L. J. Q. B. 301.

<sup>2</sup> 6 H. & N. 502.

<sup>3</sup> 1 Burr., at p. 31.

<sup>4</sup> 40 L. T. N. S. 744.

in the goods being in one person more than another," a mere conduit-pipe, as it has been called? In my opinion, an auctioneer who sells and delivers in ordinary course is more than a mere broker or intermediary.

"An auctioneer," says Lord Loughborough in *Williams v. Millington*,<sup>1</sup> "has a possession coupled with an interest in goods he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompence of a commission *del credere*." In *Fowler v. Hollins*, Brett, J., in speaking of the new assignment in *Lancashire Wagon Co. v. Fitzhugh*,<sup>2</sup> which was held to show a conversion, says: "If it rested only on a delivery as I think it might, it is because the delivery under a sale by a sheriff or an auctioneer is a delivery with intent to pass the property and so more than a simple asportation and delivery." In the same case in the House of Lords, Cleasby, B., at p. 787, says: "How far the intermeddling with the goods themselves by delivering them would do so," *i. e.*, involve responsibility, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in each case could be regarded as having an independent possession of the goods and delivering for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable as upon a conversion to the real owner.")

These authorities would seem to dispose of one of Mr. Foote's main arguments, that the auctioneer never had possession, and acted throughout as a mere intermediary between his employer and the purchasers. In this respect he contended that he stood in a better position than the defendant in *Turner v. Hockey*,<sup>3</sup> who, he pointed out, undoubtedly had possession of the cow which was the subject of the action, and he relied on that case as directly in point. In order to see exactly what that case did decide, it is, I think, necessary to examine the two cases turning on somewhat similar facts which preceded it, *viz.*: *Cochrane v. Rymill*,<sup>4</sup> and *National Mercantile Bank v. Rymill*.<sup>5</sup>

<sup>1</sup> 1 H. Bl., at p. 84.

<sup>3</sup> 56 L. J. Q. B. 301.

44 L. T. N. S. 767.

<sup>2</sup> 6 H. & N. 502.

<sup>4</sup> 40 L. T. N. S. 744.

In *Cochrane v. Rymill*,<sup>1</sup> the defendant, an auctioneer, had received at his repository certain horses and cabs from one Peggs, with instructions to sell them by auction. The defendant made him an advance on the goods, and afterwards sold them. The goods, in fact, belonged to the plaintiff, to whom Peggs had given a bill of sale; but of this the defendant knew nothing. It was held by the Court of Appeal, affirming Lord Coleridge, C. J., that the defendant was liable for conversion. Bramwell L. J., however, put the following case as one clearly not constituting a conversion. "What," said he, "if a man were to come into an auctioneer's yard holding a horse by the bridle, and saying, 'I want to sell this horse; will you find me a purchaser?' Then, if the auctioneer says to the bystanders, 'There is a man who wants to sell a horse; will any one buy him?' and some one bought the horse, then there would be no act of conversion on the part of the auctioneer; he would be merely a conduit-pipe; but in this case there is clearly a dealing with the property by the defendant as if he were a person who had the right to dispose of the property."<sup>2</sup>

The next case, *National Mercantile Bank v. Rymill*,<sup>3</sup> was an action of conversion against the same defendant. One, Seaman, had given a bill of sale of certain horses to the plaintiffs. He afterwards sent the horses to the defendant's for sale by auction. The horses were entered in defendant's catalogue. The defendant knew nothing of the bill of sale. Before the auction Seaman sold the horses by private contract to one Townsend. The conditions of sale in the defendant's yard were the same whether horses were sold by auction or by private contract. The purchase-money was paid to the defendant, who deducted his commission and paid the balance to Seaman, and by Seaman's consent gave a delivery order to the purchaser. It was held by the Court of Appeal, overruling Lopes, J., that there was no conversion by the defendant; that the sale was not by him, but by Seaman; and that handing the delivery order to the purchaser at Seaman's request did not carry the case any further.

This decision, which, strange to say, does not appear to be reported elsewhere, seems to me to be one of great importance upon the law of conversion, and to be a long step in the direction which Brett, J., invited the House of Lords to take in *Hollins v. Fowler*. The goods were not re-delivered to the bailor, but were delivered to the buyer from the bailor with knowledge of the sale and with the intention of enabling it to be carried out. The defendant *qua* the giving the delivery order, seems to have been in exactly the same position as if he had carted the goods at the seller's instance to a railway station for delivery to the buyer under a contract in which he was a mere intermediary, which is precisely the position in which Brett, J., considered the defendants to be in *Fowler v. Hollins*. It seems to me, therefore,

<sup>1</sup> 40 L. T. N. S. 744.

<sup>2</sup> 27 W. R., at p. 777; s. c. 40 L. T. N. S., at p. 746.

<sup>3</sup> 44 L. T. N. S. 767.



to be a decision of the Court of Appeal in favor of Brett, J.'s, view as against that of Martin, B., in *Burroughes v. Bayne*, and *Fowler v. Hollins*, and also, I think, against the opinion of Blackburn, J., in the same case in the House of Lords: see the illustration given by him of a railway company fixed with knowledge that the carriage is not a mere transfer of custody, but for the purpose of transferring the property from a *de facto* owner to one who was going to use up the goods. The court, in distinguishing *Cochrane v. Rymill*,<sup>1</sup> note the fact that the defendant in that case had a lien on the goods for an advance as well as that he effected the sale himself; but, having regard to the authorities, which I have already cited as to the position of an auctioneer, this superadded lien made no difference except as a fact negating the suggestion that he was a mere agent or "conduit-pipe" in that particular sale. Brett, L. J., clearly thought that had the sale in the case before him been the act of the auctioneer, and not of the parties themselves, he would have been guilty of conversion.

The next case is *Turner v. Hockey*,<sup>2</sup> of which the head-note is as follows: "An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion." The facts as to delivery are not stated; but I infer that delivery was made under the contract. If, therefore, the head-note correctly states the decision, it would be conclusive of this case, and Mr. Foote very properly relied upon it as decisive.

Two points, however, arise upon it. First, does the head-note correctly state the decision? Second, if it does, am I bound to follow it? In my opinion, if delivery under the contract be assumed, the proposition stated in the head-note is not law. It seems to me to be in direct conflict both with principle and with authority. It was questioned by Romer, J., in *Barker v. Furlong*,<sup>3</sup> and it is observed upon in Messrs. Clerk & Lindsell's valuable treatise on Torts, at p. 171. It was decided as recently as 1887. I should therefore feel at liberty to act on my own judgment. On examining the case, however, I think the head-note goes far beyond the *decision of the court*, though some of the observations of Day, J., might seem to support it. The facts were as follows: The action was against a cattle salesman for conversion of a cow which was comprised in a bill of sale given by one Phillips to the plaintiff. Phillips took the cow to the market and placed her in the defendant's pen, giving the defendant instructions to sell her. The defendant had notice of the bill of sale. The defendant got an offer of £11 for the cow; *but, instead of selling on his own responsibility, he communicated it to Phillips, who accepted it.* The money was paid by the purchaser into the Cattle Exchange Bank to the defendant's account, and paid out to

<sup>1</sup> 40 L. T. N. S. 301.

<sup>2</sup> 56 L. J. Q. B. 301.

<sup>3</sup> [1891] 2 Ch. at p. 183.

Phillips on an authority given by the defendant, Phillips having paid the defendant a commission of 5s. It does not clearly appear, therefore, that the defendant in fact did more than submit an offer; the bargain may have been concluded and the sale effected by Phillips and the purchaser without any further intervention on the part of the defendant, and in this view the case would be exactly within *National Mercantile Bank v. Rymill*,<sup>1</sup> and Willes, J., seems to have so regarded it, as he treats it as covered by the illustration which I have quoted above, as put by Bramwell, L. J., in *Cochrane v. Rymill*.<sup>2</sup> The decision of the court, therefore, does not support the head-note, and the case is no authority for the now defendant. On the other hand, the decision of Romer, J., above cited, is directly in point, save that there the sale took place in a public room, which, as pointed out in the passage from *Williams v. Millington*,<sup>3</sup> above cited, can make no difference. On the whole, therefore, I am of opinion that the defendants in this case transferred as far as in them lay the dominion over and property in the goods to the purchasers, in order that they might dispose of them as their own, and my judgment must, therefore, be for the plaintiffs for £29 10s. with costs.

*Judgment for plaintiffs.*<sup>4</sup>

## JAMES DONAHUE v. BENJAMIN D. SHIPPEE.

IN THE SUPREME COURT, RHODE ISLAND, FEBRUARY 5, 1887.

[Reported in 15 *Rhode Island Reports*, 453.]

MATTESON, J.<sup>5</sup> This is an action of trover for the conversion of a quantity of standing grass. The plaintiff purchased the grass growing on a parcel of land, and the Cranston Bleaching and Dyeing Company purchased the grass growing upon an adjoining parcel. There

<sup>1</sup> 44 L. T. N. S. 767.

<sup>2</sup> 40 L. T. N. S., at p. 746.

<sup>3</sup> 1 H. Bl., at p. 84.

<sup>4</sup> *Hardman v. Booth*, 1 H. & C. 803; *Ogden v. Benas*, L. R. 9 C. P. 513; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Cochrane v. Rymill*, 27 W. R. 776, 40 L. T. Rep. 744, s. c.; *Nat. Bank v. Rymill*, 44 L. T. Rep. 767; *McEntire v. Potter*, 22 Q. B. D. 438; *Barker v. Furlong*, 91, 2 Ch. 172 (discrediting *Turner v. Hockey*, 56 L. J. C. L. 301; see 4 L. Q. Rev. 117); *Ganly v. Ledwidge*, Ir. R. 10 C. L. 33; *Delaney v. Wallis*, L. R. 14 Ir. 31; *Perminster v. Kelly*, 18 Ala. 716; *Marks v. Robinson*, 82 Ala. 69, 83; *Hudman v. Dubose*, 85 Ala. 446; *Rogers v. Huie*, 1 Cal. 429; *Cerkel v. Waterman*, 63 Cal. 34; *Swim v. Wilson*, 90 Cal. 126 (overruling *Rogers v. Huie*, 2 Cal. 571); *Pool v. Adkisson*, 1 Dana, 110; *Kimball v. Billings*, 55 Me. 147; *McPheters v. Page*, 83 Me. 234; *Coles v. Clark*, 3 Cush. 399; *Hills v. Snell*, 104 Mass. 173, 177; *Robinson v. Bird*, (Mass., 1893) 33 N. E. R. 391; *Koch v. Branch*, 44 Mo. 542; *Bereich v. Marye*, 9 Nev. 312; *Everett v. Coffin*, 6 Wend. 603; *Hoffman v. Carow*, 22 Wend. 285 (affirming s. c. 20 Wend. 21); *Dudley v. Hawley*, 40 Barb. 397; *Anderson v. Nicholas*, 5 Bosw. 121; *Courtis v. Kane*, 32 Vt. 232, 234 *Accord*.

*Roach v. Turk*, 9 Heisk. 708 (overruling *Taylor v. Pope*, 5 Coldw. 413); *Frizzle v. Rundle*, 88 Tenn. 396 *Contra*. — ED.

<sup>5</sup> Only the opinion of the court is given. — ED.

was no fence separating the parcels, nor any bounds to mark the line between them. The defendant, who was employed by the Cranston Bleaching and Dyeing Company, cut by its direction the grass purchased by it, and, not knowing where the boundary line was, unintentionally cut some of the plaintiff's grass. He himself, however, did nothing more than cut the grass. He left it on the ground where it was cut, and other employees of the Cranston Bleaching and Dyeing Company spread it, and, when it was sufficiently cured, raked it up, drew it away, and put it into the company's barn. Subsequently the plaintiff, having ascertained that the grass had been cut by the defendant, brought this action.

The question raised by the exceptions is, whether the mere cutting of the grass without removing it, or attempting to do so, and without preventing the plaintiff from removing it, amounted to a conversion.

We think the question must be answered in the affirmative. The cutting of the grass, as the grass of the Cranston Bleaching and Dyeing Company, with the intent that it should be appropriated to the company's use, was an act of dominion over it equivalent to an assertion of the company's ownership of it, and, therefore, an act necessarily inconsistent with the title of the plaintiff. Such an act is clearly a conversion. Remarks of Brett, J., in *Fowler v. Hollins*; note to *Donald v. Suckling*.<sup>1</sup> In 6 Bacon Abr. 677, the editor defines a conversion in the following words: "The action being founded upon a conjunct right of property and possession, any act of the defendant which negatives, or is inconsistent with, such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another's use." This language has been adopted in *Bristol v. Burt*; *Reynolds v. Shuler*; <sup>2</sup> *Liptrot, Adm'r, v. Holmes*.<sup>3</sup> In *Reid v. Colcock*,<sup>4</sup> the court remarks: "Every assuming to dispose of the property of another, or the least intermeddling with it, in a manner subversive of the dominion which the owner has over it, is sufficient evidence of a conversion."

Nor does the fact that the cutting of the grass was unintentional, in the sense that it was done in ignorance of the location of the boundary line, make any difference. It was, nevertheless, a wrongful assumption of dominion over the property of the plaintiff in violation of his right. In *Boyce v. Brockway*,<sup>5</sup> it is said: "Wrongful intent is not an essential element of the conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it." So, too, in *West*

<sup>1</sup> Bigelow, Lead. Cas. on Torts, 428.

<sup>2</sup> 5 Cow. 323.

<sup>3</sup> 1 Ga. 391.

<sup>4</sup> 1 Nott & McCord, 592, 598.

<sup>5</sup> 31 N. Y. 490, 493.

Jersey R. R. Co. v. Trenton Car Works Co.,<sup>1</sup> the court says: "In every case in which the inquiry arises whether a conversion has been committed, the only point to be settled is whether the defendant has applied to his own use the property of another without his permission and without legal right. His motives for so doing, or the state of his knowledge with reference to the right of such owner, are of no importance, and cannot in any respect affect the case." And see, also, *Fowler v. Hollins*; *McCombie v. Davies*. And it has repeatedly been held that it is no protection to one who has received property and disposed of it in the usual course of trade that he did so in good faith, and in the belief that the person from whom he took it was the owner, if in fact the possession of such person was tortious. *Hardman v. Booth*;<sup>2</sup> *Everett v. Coffin*;<sup>3</sup> *Williams v. Merle*; *Galvin v. Bacon*; *Carter v. Kingman*.<sup>4</sup>

*Exceptions overruled; judgment of Court of Common Pleas affirmed, with additional costs of this court.*

*John Palmer*, for plaintiff.

*Ziba O. Slocum*, for defendant.

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## BURDITT AND ANOTHER v. HUNT AND ANOTHER.

SUPREME JUDICIAL COURT, MAINE, JULY TERM, 1845.

[Reported in 25 Maine Reports, 419.]

**TROVER** for certain goods. The plaintiffs, to show title in themselves, offered a mortgage from Robert Kellen to them, without date, recorded Feb. 1, 1842, of "all and singular the goods, wares, and merchandise, stock, harness work, and other articles of every kind and description now in the shop occupied by me in said Bangor." The plaintiffs then introduced the subscribing witness to the mortgage, and proposed to prove by him that the mortgage was executed and delivered on Feb. 1, 1842. To this the defendants objected; but the testimony was admitted by Tenney, J., presiding at the trial.

It appeared from the evidence that the property was left in the possession of Kellen, the mortgagor, with authority to sell as agent for the plaintiffs, for cash and in small parcels. The sale of part of these goods by Kellen to Hunt, under which he claimed, was not within the authority, and the plaintiffs refused to ratify it. The exceptions state that it was contended on the part of McMullen, the other defendant, that he, as servant of Hunt, ignorant alike of the existence of the mortgage and of the terms of the contract of sale by Kellen to Hunt, and of any circumstances tending to show that the sale was invalid,

<sup>1</sup> 32 N. J. 517, 520.

<sup>3</sup> 6 Wend. 603, 609.

<sup>2</sup> 1 H. & C. 803, 806.

<sup>4</sup> 103 Mass. 517

was sent by Hunt to bear the articles from Kellen's shop to Hunt's; that as Hunt's servant he received them from Kellen, and deposited them in Hunt's shop, and had no further connection with them, and that therefore he was not liable to the plaintiffs in this action. The exceptions also state that there was evidence in the case tending to sustain McMullen's position.

The presiding judge instructed the jury that the mortgage vested in the plaintiffs' title to all the goods in Kellen's shop on the first day of February, and that if Hunt was liable in this action, and McMullen as his servant aided him in removing the goods, then McMullen was liable for all the goods he so removed.

The verdict was for the plaintiffs, and the defendants filed exceptions. *Rowe* moved for the defendants.

*Robinson*, for the plaintiffs.<sup>1</sup>

The opinion of the court was drawn up by

SHEPLEY, J. The goods having been left in the possession of the mortgagor with authority to sell them for cash in small parcels, he sold and delivered those for which this action was brought to the defendant Hunt; but in so doing exceeded his authority. There was testimony tending to prove that the other defendant, McMullen, as the servant of Hunt, was sent for them, and that he received them by the delivery of the mortgagor, and deposited them in Hunt's shop; that he was ignorant of the existence of the mortgage and of the terms of the sale to Hunt; and that he had no other connection with them.

The jury were instructed if Hunt was liable, and McMullen, as his servant, aided him in removing the goods, he would be liable for those which he removed. A servant, who receives goods delivered to him and carries and delivers them to his master, can be held responsible for them in action of trover only, on the ground that such a removal of them amounts to a conversion. If such a position could be maintained, common carriers and other persons, by receiving goods delivered to them by a person in possession of them, and carrying them to another place, would thereby be made liable for their value, if it should afterward be made to appear that the goods were delivered without authority from the owner. And yet the possession of personal property is *prima facie* evidence of ownership. Such a position cannot, however, be sustained. Conversion is the gist of the action of trover, and conversion is a tort. *Draper v. Fulkess*,<sup>2</sup> *Fuller v. Smith*.<sup>3</sup> When goods come to the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act. 2 Saund. 47 e; *Mulgrave v. Ogden*.

The reception of them by delivery from one whom he is entitled to regard as the owner, and the conveyance from him to another, to whom they are sent, are not tortious acts. In the case of *Parker v. Godin*, the defendant, who acted as the friend or servant of another, was held

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> Yelv. 165.

<sup>3</sup> 3 Salk. 366.

liable in such an action, because he pawned the goods in his own name, which had been improperly delivered to him. In the case of *Perkins v. Smith*, a bankrupt after the act of bankruptcy delivered goods to a servant to be carried to his master, and the servant sold them for his master's use, and was held to be liable for them in such an action. In both these cases the servant was considered to be liable only on the ground that they committed tortious acts by pawning and selling the goods. A refusal to deliver goods on a demand made by the owner may be a tortious act and a conversion by one who is in possession of them. There is no evidence exhibited in this case tending to prove that the servant committed any tortious act, or that he assisted his master in such an act.

*Exceptions sustained, and new trial granted.<sup>1</sup>*

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### COLES v. F. WRIGHT.

IN THE COMMON PLEAS, NOVEMBER 28, 1811.

[Reported in 4 Taunton, 198.]

MANSFIELD, C. J.<sup>2</sup> This was an action brought by the plaintiff, as assignee of the effects of Samuel Wright, against the defendant, to recover money alleged to be had and received by the defendant, to the plaintiff's use. The ground of the action is, that Samuel Wright the bankrupt had been committed to prison, and after he had been committed to prison, he employed Robins, an auctioneer, to sell certain goods, who delivered £79, the money produced by the sale, to the defendant, to be carried to his brother, S. Wright. S. Wright received it, and paid away part of it, and it does not appear what he did with the rest: the defendant then having received this sum of £79, it is said the bankrupt's assignees are entitled to recover, because S. Wright became a bankrupt by continuing two months in prison; and upon the trial the defence was, that the defendant received the money merely as a messenger, or carrier of the money between the one party and the other, and that as such, and having paid it over, he was not liable. We find no case in which this doctrine of relation of an act of bankruptcy, committed by suffering imprisonment, has been carried so far as to charge a man with money received for a trader lying in prison, at a time before he became a bankrupt. There was evidence that the brother knew he was in prison; and it was urged for the plaintiffs,

<sup>1</sup> *Freeman v. Scarlock*, 27 Ala. 407, 413 (*semble*); *Smith v. Colby*, 67 Me. 169, 171; *Strickland v. Barrett*, 20 Pick. 415; *Metcalf v. McLaughlin*, 122 Mass. 84; *Gurley v. Armstead*, 148 Mass. 267; *Turner v. Brown*, 6 Hun, 331 (*semble*); *Deering v. Austen*, 34 Vt. 330 *Accord*.

See also *Mires v. Solebay*, 2 Mod. 242. — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

that inasmuch as every man is supposed to know the law, the defendant was conscious that his brother would thereby become a bankrupt. There was also evidence of a meeting of creditors to consider the state of S. Wright's circumstances, but no evidence that the brother knew it: according to the decided cases the action might be brought against the auctioneer; but it seems a monstrous thing to say, that every one who takes money in the character of a messenger or bearer, should be so liable; it may happen to pass through the hands of two or three persons, who would each be liable to such an action. No case goes that length, and the doctrine of the relation of the act of bankruptcy, is in all cases extremely hard, and in many shocking, and it is not to be carried further than we are compelled to carry it: and therefore we think we are bound to say that the defendant is not liable to this action, and the rule *nisi* to enter a nonsuit must be made

*Absolute.*<sup>1</sup>

<sup>1</sup> *Tope v. Hockin*, 7 B. & C. 101 (*semble*) *Accord*.

#### POND v. UNDERWOOD.

AT NISI PRIUS, BEFORE LORD HOLT, C. J., MICHAELMAS TERM, 1706.

[*Reported in 2 Lord Raymond*, 1210.]

IN an *indebitatus assumpsit* brought by the plaintiff, Armanuell Pond, as executor of Charles Pond, deceased, for money received by the defendant, owing to the testator for wages (he being a seaman) after the testator's death. On not guilty pleaded, it appeared on evidence at the trial, that before the will was found, administration, &c., was granted to Anne Pond, a sister of Charles Pond, and that she made a warrant of attorney to the defendant to receive this money, being £21, by virtue of which warrant he did receive it, and paid it to Anne before any notice given of this will. And by the direction of the Lord Chief Justice Holt, before whom it was tried at Guildhall the sittings after Michaelmas term, 1705, the plaintiff was nonsuited: for by him, though all acts done by an administrator, where there is a will are void, and such an action in this case would lie against Anne Pond; yet it is hard to make the defendant liable, having paid the money over, before he knew of the will, to the administrator.\*

\* Two years before, Trevor, C. J., made a contrary ruling in *Jacob v. Allen*, Salk. 27. In *Sadler v. Evans*, 4 Burr. 1984, 1986, it is reported that "Lord Mansfield expressed a dissent to the case of *Jacob v. Allen*, and his approbation of *Pond v. Underwood*, which is contrary to it."

In *Sharland v. Mildon*, 5 Hare, 469, the defendant, mistakenly believing that A. had proved a will and taken out letters of administration, at A.'s request collected certain debts due to the estate, and paid the money to A. The defendant was charged as executor *de son tort* by a subsequent administrator *d. m. a.* See also *Ex parte Edwards*, 13 Q. B. Div. 747, 751. — ED.

## NATHANIEL B. SPOONER v. EPHRAIM B. HOLMES.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1869.

[Reported in 102 Massachusetts Reports, 503.]

GRAY, J.<sup>1</sup> This is an action of tort, in the nature of trover, for certain coupons of United States bonds, alleged in the declaration to be the property of the plaintiff and to have been converted by the defendant to his own use. The undisputed evidence at the trial showed that the bonds had belonged to the plaintiff, and had been stolen from him, and delivered by one who received them from the thief to the defendant, and by him sold and turned into money, which he is admitted to have paid over to his principal. But the jury have found that in so doing the defendant acted only as agent of the person from whom he received them, and did not know, and was not guilty of gross negligence in not knowing, that that person had come dishonestly by them. It does not appear that the plaintiff ever demanded of the defendant either the coupons or their proceeds, or that the defendant personally derived any benefit from his acts. The principal question in the case is, whether, under these circumstances, he is liable in this action. This is an important question, and has received great consideration from the court.

An action of tort for the conversion of personal property, under our present system of pleading, requires such evidence to support it as would have proved a conversion in an action of trover at common law; and cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property. *Fouldes v. Willoughby*, *Heald v. Carey*,<sup>2</sup> Gen. Sts. c. 129, § 81, *Robinson v. Austin*,<sup>3</sup> *Loring v. Mulcahy*, *Parker v. Lombard*.<sup>4</sup> In the last case, Mr. Justice Hoar says that if a bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion; and cites *Strickland v. Barrett*,<sup>5</sup> and *Leonard v. Tidd*. So where chattels were delivered by the owner to a bailee, with the right to purchase them by paying a certain price, so that he had the actual legal and rightful possession, although he had not performed the condition on which he was to have the absolute title, and he sold them to a third person, who resold them before any demand made upon him and without notice of the agreement between his vendor and the original owner, he was held not to be liable to the latter in trover. *Vincent v. Cornell*.<sup>6</sup> See also

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 11 C. B. 977.

<sup>3</sup> 2 Gray, 564.

<sup>4</sup> 100 Mass. 405.

<sup>5</sup> 20 Pick. 415.

<sup>6</sup> 13 Pick. 294.



Day v. Bassett.<sup>1</sup> And trover will not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful. Bul. N. P. 47; Powell v. Hoyland.<sup>2</sup>

In the case of a sale of goods, indeed, the purchaser is bound to look to his title, and, if he obtains them from one who is not the lawful owner or his authorized agent, cannot hold them against him. 2 Kent Com. (6th ed.) 324. If the goods have been stolen, the property does not pass by delivery, and a person who derives his title from the thief gains no rights as against the lawful owner, and if he either refuses upon demand to deliver them up; or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover. Dame v. Baldwin,<sup>3</sup> Heckle v. Lurvey.<sup>4</sup> Upon this principle, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen; or a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person; is liable to the rightful owner in trover, without a previous demand. Hoffman v. Carow,<sup>5</sup> Coles v. Clark,<sup>6</sup> Gilmore v. Newton.<sup>7</sup> Yet even in the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and, before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. Loring v. Mulcahy.

But, in the opinion of a majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the government, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are therefore not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. Wookey v. Pole,<sup>8</sup> Gorgier v. Mievill,<sup>9</sup> Commonwealth v. Emigrant Industrial Savings Bank.<sup>10</sup> The rule of *caveat emptor* does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank, unless it is proved that he did not take it in good faith and for valuable consideration; and that his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. Worcester County Bank v. Dorchester & Milton Bank,<sup>11</sup> Wyer v. Dorchester & Milton Bank,<sup>12</sup> Raphael v. Bank of England.<sup>13</sup> And, according to the great weight of authority, the same rule applies to bills of exchange or promissory notes payable to bearer. Goodman v. Simonds.<sup>14</sup>

<sup>1</sup> 102 Mass. 445.<sup>2</sup> 6 Exch. 67.<sup>3</sup> 8 Mass. 518.<sup>4</sup> 101 Mass. 344.<sup>5</sup> 22 Wend. 285.<sup>6</sup> 3 Cush. 399.<sup>7</sup> 9 Allen, 171.<sup>8</sup> 4 B. & Ald. 1.<sup>9</sup> 4 D. & R. 641; s. c. 3 B. & C. 45.<sup>10</sup> 98 Mass. 12.<sup>11</sup> 10 Cush. 488.<sup>12</sup> 11 Cush. 51.<sup>13</sup> 17 C. B. 161.<sup>14</sup> 20 How. 343.

The jury have found that the defendant took these coupons in good faith, without gross negligence, and as agent of his employer. He thus acquired a lawful possession of them, which was no evidence of a conversion. He then, before any demand or notice from the rightful owner, transferred them by delivery, and exchanged them for money, the amount of which he paid over to his employer. This case does not present the question whether the defendant could have been held liable to the rightful owner for the coupons or the proceeds while in his own hands, nor whether he could be held to have paid value for them. The single question is, whether he has been guilty of a wrongful conversion; and, considering the nature of the instruments, and the fact that the defendant was acting in good faith, without gross negligence, as agent only, without himself receiving any benefit from the transaction, a majority of the court is of opinion that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to his employer, constituted a conversion for which he can be held liable in an action of tort in the nature of trover. Addison on Torts, (3d ed.) 317. The instructions to the jury were therefore quite favorable enough to the plaintiff.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> Kimball v. Billings, 55 Me. 147 *Contra.* — Ed.

SECTION II. (*continued.*)

## (g) MISCELLANEOUS ACTS OF DOMINION.

## LORD PETRE v. HENEAGE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., EASTER TERM, 1699.

[*Reported in 12 Modern Reports, 519.*]

TROVER<sup>1</sup> by the plaintiff, as administrator *cum testamento annexo* of the late Lord Petre, against the wife of the first executor, for a necklace of pearl, said to have been in the family for many generations, and worn as a personal ornament by Lady Petre for the time being, or for default of such by the lady dowager, *pro tempore*.

And here, by HOLT, C. J., the wearing of a pearl is a conversion.<sup>2</sup>

## KEYWORTH v. HILL AND WIFE.

· IN THE KING'S BENCH, JUNE 14, 1820.

[*Reported in 3 Barnewall & Alderson, 685.*]

TROVER against husband and wife, for a bond and two promissory notes. The declaration stated that the defendants converted and disposed of the same to their own use. Plea, not guilty. Verdict for the plaintiff.<sup>3</sup>

ABBOTT, C. J. The question, in this case, arises upon a motion in arrest of judgment. The ground of the objection is, that inasmuch as a married woman cannot acquire property, the conversion of the property can only be the act of the husband, and must be so charged. If the allegation in the declaration, that the defendants converted the property to their own use, necessarily imported an acquisition of property by them, there would be considerable weight in the objection. It seems to me, however, that that is not the necessary import of the expression, for a conversion may be by an actual destruction of the

<sup>1</sup> Only so much of the case is given as relates to the question of conversion. — Ed.

<sup>2</sup> See *Poulton v. Wilson*, 1 F. & F. 403; *Gray v. Crocheron*, 8 Port. 191; *Gentry v. Madden*, 3 Ark. 127; *Clark v. Whitaker*, 19 Conn. 319; *Adams v. Mizell*, 11 Ga. 106; *Barton v. White*, 1 Har. & J. 579; *Dickey v. Franklin Bank*, 32 Me. 572; *Lathrop v. Blake*, 23 N. H. 46; *Chesh. R. R. Co. v. Foster*, 51 N. H. 490; *Spencer v. Blackman*, 9 Wend. 167; *Nauman v. Caldwell*, 2 Sweeny, 212; *Collins v. Bennett*, 46 N. Y. 490; *Scruggs v. Davis*, 5 Sneed (Tenn.), 261; *Arnold v. Kelly*, 4 W. Va. 642. Compare *Chandler v. Partin*, 2 Mill, C. R. 72; *Quay v. M'Ninch*, 2 Mill, C. R. 78. — Ed.

<sup>3</sup> The statement of the case is abridged, and the arguments of counsel and the concurring opinions of HOLROYD and BEST, JJ., are omitted. — Ed.

property. And if the allegation does not necessarily import that the defendants acquired a property, we are bound, after the verdict, to consider the conversion to have taken place by other means than by the acquisition of property. I am, therefore, of opinion that the declaration is sufficient, and that this rule should be discharged.

BAYLEY, J. It is quite clear that in trespass the husband and wife might be jointly sued. The reason of which is, that the action is founded on the wrongful act of the defendants. Now, it seems to me, that the action of trover is founded on the tort also. The cases cited on the part of the defendant proceed upon the supposition that the conversion could only take place by the defendants acquiring a property. It seems to me, however, that in trover the foundation of the action is not the acquisition of property by the defendants, but the deprivation of property to the plaintiffs. If the wife were to take up a book, and her husband desired her to put it in the fire and burn it, and she did burn it, that would be a conversion, and yet the husband and wife would acquire no property; so, if a man takes my horse and rides it, I may bring trover for the temporary conversion. And if there can be any case of a conversion without an ultimate change of property, we are bound, after verdict, to imply that it was such a conversion as the wife might be guilty of.

*Rule discharged.*<sup>1</sup>

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## SUMMERSETT v. JARVIS AND OTHERS.

IN THE COMMON PLEAS, JUNE 29, 1821.

[*Reported in 3 Broderip & Bingham, 2.*]

TROVER for sundry account-books, and other property. At the trial, before Dallas, C. J., Guildhall sittings after Hilary term last, the defendants, who were assignees under a commission of bankrupt, which had been issued against the plaintiff (a farmer, who kept hounds), proved that he, having purchased for his hounds a number of dead horses, had been accustomed to sell the skins and bones; and, upon one occasion, said he should make a good thing of them. The plaintiff's witnesses said the dead horses were purchased expressly for the dogs, and never with any view of ulterior profit. They also proved

<sup>1</sup> *Marshe's Case*, 1 Leon. 312; *Draper v. Fulkes*, Yelv. 165; *Baldwin v. Mortin*, Ow. 48; *Coxe v. Cropwell*, Cro. Jac. 5; *Hodges v. Sampson*, W. Jones, 443; *Newman v. Cheyney*, Latch. 126; *Catterall v. Kenyon*, 3 Q. B. 310; *Heckle v. Lurvey*, 101 Mass. 344 (but see *Tobey v. Smith*, 15 Gray, 535); *Kowing v. Manley*, 49 N. Y. 192 *Accord*.

*Berry v. Nevys*, Cro. Jac. 661; *Rhemes v. Humphreys*, Cro. Car. 254; *Perry v. Diggs*, Cro. Car. 494; *Bullen's Case*, W. Jones, 264; *Gallop v. Symson*, Style, 115; *Note*, 1 Brownl. 3; *Reames v. Humphries*, 1 Roll. Abr. 348 *Contra*. See also *Clark v. Pew*, Style, 18; *Rowell v. Keefe*, 6 Rich. 521.

Compare *Mires v. Solebay*, 2 Mod. 242. — Ed.

that the defendant, Jarvis, in the character of assignee, had insisted on the plaintiffs delivering up his books, and that he thereupon delivered them; but it was not proved that the plaintiff had demanded the books of the defendants previously to the commencement of this action. The jury having found a verdict for the plaintiff, and that he was not a trader when the petitioning creditor's debt accrued,

*Taddy*, Serjt., on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit instead, or for a new trial, on the ground first, that the verdict was against evidence; secondly, that the plaintiff, having delivered his books for a legal purpose to the assignees, when called on to do so, had not parted with them on compulsion; so that, until a formal demand was made by the plaintiff, the defendants were guilty of no conversion; and such demand having never been made, the plaintiff could not maintain his action. *Nixon v. Jenkins*.<sup>1</sup>

*Lens*, Serjt., for the plaintiff.<sup>2</sup>

THE COURT expressed a clear opinion that the facts of this case did not constitute a trading, within the intent of the bankrupt laws; that the defendants having taken the books when they were armed with the authority of assignees, the plaintiff must be deemed to have delivered them up on compulsion; that the defendants were thereby guilty of a conversion; and that, consequently, the plaintiff's action was maintainable, without any formal demand on his part. *Rule discharged*.<sup>3</sup>

## FEATHERSTONHAUGH v. JOHNSTON.

IN THE COMMON PLEAS, APRIL 13, 1818.

[Reported in 8 Taunton, 237.]

TROVER. At the trial of the cause before Park, J., at the sittings at Guildhall after the last term, it appeared that the plaintiff agreed to send a cargo of bottles by a ship of one Humble, from Sunderland to London. A dispute afterwards arose respecting the payment of freight and demurrage, whereupon the ship was ordered by Humble to sail, and the bottles were consigned by him to the defendant, who, without notice of any adverse claim, sold a part. Afterwards the plaintiff informed the defendant that the bottles were his property, and demanded to have them delivered up to his disposal; to which the defendant answered that the greater part had been already sold. It was contended at the trial that the defendant was liable in this action only for the value of the part remaining unsold in his possession. The

<sup>1</sup> 2 H. Bl. 135.

<sup>2</sup> The argument for the plaintiff is omitted. — ED.

<sup>3</sup> *Grainger v. Hill*, 4 B. N. C. 212; *Powell v. Hoyland*, 6 Ex. 67 (*semble*). Accord. — ED.

jury found a verdict for £717, being the value of the whole; but leave was given to move to reduce it to £347, the value of the part remaining unsold.

*Hullock*, Serjt., now moved accordingly.<sup>1</sup>

GIBBS, C. J. I agree to the proposition that the demand and refusal in the case cited did not amount to a conversion. But it sometimes happens that two points might be made in a case, and only one is made; and I cannot take the decision on that point as an authority to decide the other. In the present case, the defendant has been proved to have actually sold the goods in dispute, and a sale alone has been held, in many cases, to amount to a conversion. The principle of law is against the defendant, who has applied the goods to his own use. In the case of *Horwood v. Smith*,<sup>2</sup> an action of trover was brought by the owner of goods against the defendant, who had sold them, and it appeared that the goods had been stolen, and sold in market overt to the defendant; and afterwards, and before the conviction, notice was given to the defendant by the plaintiff that the goods were his property, and, nevertheless, the defendant sold them. After conviction the action was brought; and it was held that the plaintiff could not recover, because the sale in market overt protected the goods until conviction, and therefore the defendant was not liable for a sale during the protection;<sup>3</sup> but, unquestionably, if the defendant there had sold after protection had ceased, the action would have lain. Therefore, I think there is no ground for the present motion.

DALLAS, J., BURROUGH, J., and PARK, J., concurred.

*Rule refused.*<sup>4</sup>

## TRAYLOR AND ANOTHER v. HORRALL.

SUPREME COURT, INDIANA, AUGUST 22, 1837.

[Reported in 4 *Blackford*, 317.]

ERROR to the Daviess Circuit Court.

BLACKFORD, J. Trover by Horrall against Traylor, Capehart, and Cain. Plea: Not guilty. The only evidence respecting the conversion was as follows: The plaintiff had put his corn into a crib, which he had hired for the purpose of Kinman, and which stood on Kinman's land. The defendants and some other persons being present where the crib of corn was, Capehart offered the corn at public sale, and Traylor bid it off

<sup>1</sup> The argument of *Hullock* is omitted. — ED.

<sup>2</sup> 2 Term Rep. 750.

<sup>3</sup> Similarly, the sale by the vendee of an infant, before the latter elects to avoid the sale, is not a conversion. *Carr v. Clough*, 26 N. H. 280. — ED.

<sup>4</sup> *Vandrink v. Archer*, 1 Leon. 221; *Bloxam v. Hubbard*, 5 East, 407; *Kyle v. Gray*, 11 Ala. 233; *Tomkins v. Haile*, 3 Wend. 406; *Morrill v. Moulton*, 40 Vt. 242; *Newsum v. Newsum*, 1 Leigh, 86 *Accord.* — ED.

at the price of thirty-one dollars. Cain said that he had the officers bound for his money. The plaintiff was also present, and forbid any person from selling or removing the corn, claiming it to be his. Cain afterwards said that he had got his money from Capehart. The defendants demurred to the evidence, and agreed that, if judgment were rendered for the plaintiff, the court might assess the damages. The demurrer was sustained as to Cain, but there was a judgment against the other defendants for seventy-four dollars in damages, together with costs.

We are satisfied that the record shows no evidence conducing to prove a conversion in this cause, and that the judgment for the plaintiff is consequently erroneous.

To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant. Buller's N. P. p. 33. The gist of the action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he cannot be charged with a conversion of them to his own use.

In the present cause it does not appear why the form of a public sale of the corn in question took place. It is not shown that Capehart, the alleged seller, had seized the property under any process of law, or that at the time of the sale, or at any other time, he had or pretended to have any possession of it whatever. Neither was there any attempt to prove that Traylor, the purchaser, ever took possession of the property, or exercised any act of ownership over it.<sup>1</sup>

The case of *Bristol v. Burt* is referred to by the plaintiff. But the court there expressly say that the defendant had exercised the highest and most unequivocal acts of dominion and control over the goods, not only by claiming jurisdiction over them, but by placing armed men near them to prevent their removal. They say, further, that the defendant thus detained the goods for several months, and that a charge was therefore brought upon the plaintiff. The court, in that case, do not appear to have had any idea that the suit could be maintained without showing that the defendant had intermeddled with the goods, and had for a time excluded the plaintiff from their possession. They rely on *Baldwin v. Cole*. The plaintiff had there sent his servant with some tools to work in the queen's yard for hire. The plaintiff, some time afterwards, having taken away his servant, sent for the tools, but the defendant refused to deliver them up. Trover was then brought for the tools, and the action was sustained on the ground that, as the defendant had wrongfully undertaken to detain them, he took upon himself the right to dispose of them, which was a conversion. The case in 6 Mod. Rep. is settled law, and being relied on in *Bristol v. Burt*, it shows the ground upon which the latter case was intended to be placed by the court.

<sup>1</sup> Had the purchaser taken possession in pursuance of the sale, the seller as well as the purchaser would have been guilty of a conversion. *Mead v. Thompson*, 78 Ill. 62; *Ramsby v. Beezley*, 11 Oreg. 49; *Northrup v. Trask*, 39 Wis. 515. — ED.

In *M'Combie v. Davies* the plaintiff, by his agent, bought some tobacco which was in the king's warehouse; but the agent took the transfer of the tobacco on the warehouse books in his own name. The agent afterwards pledged the tobacco in his own name with the defendant, and transferred it into the defendant's name on the books in the warehouse. The plaintiff demanded the tobacco of the defendant, who refused to deliver it up until the debt for which it was pledged should be paid. The plaintiff then sued the defendant in trover for the tobacco. It was strongly contended at the trial that there had been no conversion; and the plaintiff was nonsuited. The nonsuit, however, was subsequently set aside, and the plaintiff recovered. In that case the defendant, by the transfer to him on the dock books, had the virtual possession and exclusive control of the property, and he wrongfully refused to deliver it to the rightful owner.

In a subsequent case, Chief Justice Best took occasion to say that Lord Ellenborough, in *M'Combie v. Davies*, had gone to the extreme verge of the law; that as far as that he should go himself; but that in the case before Lord Ellenborough the state of the property was changed, because there had been a transfer in the dock books, which, it was well known, is as much a transfer, for the purposes of trade, as an actual removal from one warehouse to another; and that there was, in that case, the exercise of dominion over the goods. *Mallalieu v. Laugher*.

The cause which we are now to decide is very different from any of those to which we have referred. For anything that the record before us presents, the plaintiff may have always continued in the undisturbed possession of the corn in the place where he originally deposited it, or he may have sold it, or have otherwise converted it to his own use.

DEWEY, J., having been concerned as counsel in the cause, was absent.

*Per Curiam*. The judgment, &c., against the plaintiffs in error is reversed, with costs. *Cause remanded, &c.*<sup>1</sup>

<sup>1</sup> *Cuckson v. Winter*, 2 Man. & Ry. 313; *Herron v. Hughes*, 25 Cal. 555; *Fuller v. Tabor*, 39 Me. 519; *Davis v. Buffum*, 51 Me. 160; *Burnside v. Twitchell*, 43 N. H. 390; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Andrews v. Shattuck*, 32 Barb. 396; *Glover v. Riddick*, 11 Ired. 582; *Huddleston v. Currin*, 4 Humph. 237; *Irish v. Cloyes*, 8 Vt. 30; *Northrup v. Trask*, 39 Wis. 515 *Accord.* — Ed.



## PENNY v. THE STATE.

IN THE SUPREME COURT, ALABAMA, NOVEMBER TERM, 1889.

[Reported in 88 Alabama Reports, 105.]

CLOPTON, J.<sup>1</sup> The second count of the indictment is founded on section 3795 of Code 1886. Before the offence with which the defendant is charged is made out, it must be shown that he was the agent or servant of the owner of the cotton; that it came into his possession by virtue of his employment; and that he has embezzled, or fraudulently converted it to his own use, or fraudulently secreted it with intent to convert it to his own use.

Assuming the facts to be as testified by the State witnesses, and not regarding the statements and explanations of defendant, they are: The owner of the cotton employed him to haul seven bales from his gin-house to a factory at Cottdale, about ten miles distant, and deliver them to the manager of the factory. By virtue of his employment, he took possession of, and carried the seven bales to the factory, taking one bale the first load, and two at each succeeding load. He delivered the seven bales to the manager of the factory, taking the receipt for the bale first hauled in the name of his son, Lane Penny, which bale was marked, after leaving the gin-house, with the letters L. P.; and for the other six bales he took receipts in the name of the owner. On being questioned, shortly after he finished hauling, as to the number of bales he had carried, he replied, only six; but, on being pressed, admitted he had carried seven. Soon after this, he delivered all the receipts to the agent of the owner. On these facts, defendant requested the court to give the affirmative charge in his favor.

Conversion has been defined to be "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of the owner's rights." *Conner v. Allen*; <sup>2</sup> *Threat v. Stamps*.<sup>3</sup> It is not pretended that there was any secretion, waste, destruction, or wrongful taking of the bale of cotton. Defendant hauled and delivered as directed by the owner. The only acts done by him, not in accord with his duty, were marking the bale and taking a receipt therefor in the name of his son. These acts do not, of themselves, constitute an exercise of dominion in exclusion of the owner's rights, nor an appropriation to defendant's own use and beneficial enjoyment; nor withholding from the possession of the owner; nor an alteration of the condition of the cotton. The receipt may have armed defendant with power to exercise dominion, and to withhold the cotton from the possession of the owner; it may be the assertion of an inconsistent claim or right;

<sup>1</sup> Only the opinion of the court is given. — Ed.

<sup>2</sup> 33 Ala. 515.

<sup>3</sup> 67 Ala. 96.

but the acquisition of such power, and the assertion of such claim or right, do not constitute a conversion of the cotton itself. To complete a conversion, the assumed power must be exercised to the alteration of its condition, or to the exclusion of the owner's rights. Defendant's taking the receipt and marking the bale as was done, may be evidence of an intent to claim and appropriate the cotton to his own use; but the mere intent is not sufficient. Delivery of the receipt to the owner was an abandonment of such purpose.

The court erred in refusing to charge the jury, that if they believed the evidence, they must find defendant not guilty.

*Reversed and remanded.*<sup>1</sup>



### JAMES M. NELSON *v.* OLIVER WHETMORE.

IN THE COURT OF APPEALS, SOUTH CAROLINA, JANUARY, 1845.

[*Reported in 1 Richardson, 318.*]

BEFORE Wardlaw, J., at Charleston, Spring Term, 1844.

This was an action upon the case to recover the value of a slave named Frank, the property of the plaintiff — said to have been lost through the wrongful acts of the defendant.

There were three counts in the declaration. The first count was in trover.<sup>2</sup>

Frank was a bright mulatto slave belonging to the plaintiff. In June, 1841, he ran away. At Fayetteville he represented himself to the defendant, who was then travelling from the South to his home in New York, as a free mulatto, and asked him to take him on as his servant, for the sake of cheapness. The defendant acceding to his request, Frank travelled as the defendant's servant as far as Washington, where he disappeared.

The presiding judge refused a motion for a nonsuit, and submitted the facts to the jury on the first count. Verdict for the plaintiff for \$1,000. The defendant moved for a nonsuit or a new trial.

*F. D. Richardson*, for the motion.

*Dukes and Thomson*, contra.

*Curia, per* WARDLAW, J. The serious question is whether there was a conversion.

Conversion is an appropriation of another's property; change of ownership is implied by it. The change may be temporary or per-

<sup>1</sup> A pledgee of shares standing in the name of the pledgor is not guilty of a conversion in surrendering the certificates and taking out new ones in his own name or in a trustee for himself, there being no design to deprive the pledgor of his rights in the shares. *Terry v. Birmingham Bank*, 93 Ala. 599; *Holmes v. Day*, 103 Mass. 306; *Fay v. Gray*, 124 Mass. 500, 508. — Ed.

<sup>2</sup> Only the report on this count is given. The statement of facts has been considerably abridged, and the arguments of counsel are omitted. — Ed.

petual, but so strongly has our court insisted on this change as resulting from conversion, that when a verdict in trover is rendered whilst the chattel remains out of the possession of the plaintiff, the judgment for the plaintiff is itself without satisfaction, (which satisfaction is insisted upon elsewhere),<sup>1</sup> considered here to be an acknowledgment by the plaintiff that the title has by conversion been transferred from him. Rogers and Thompson v. Moore;<sup>2</sup> Welburn *ads. Bogan*.<sup>3</sup> Of the conversion, evidence may arise from a tortious taking, from a refusal to deliver upon demand, or from use negating the plaintiff's right. Any act in exclusion or defiance of the plaintiff's right, any assumption of property and of the right of disposition, any intermeddling indicating a claim of ownership, any assertion of the control which belongs to the owner, whether for the benefit of the defendant or of a third person, may furnish proof of the conversion. But the idea of *property* is of the essence of a conversion. Even where the chattel from its nature is necessarily known to be property, an interference with it, under circumstances which show the owner's right to be undisputed, even with injurious consequences to the owner, does not amount to a conversion; as where goods are thrown overboard to save a ship,<sup>4</sup> or where a work of charity or kindness to the owner is intended.<sup>5</sup> No intention of gain to the wrongdoer, or to anyone else, is essential, if an injury be done to the owner by an act negating his right of property. But when the chattel is not known to be property, there can be no interference with the ownership, and no conversion without an appropriation. In such a case, a defendant might in some other form of action be made to answer for any benefit acquired by himself, or for any injury done to the plaintiff by a wrongful act, but if he did not use the chattel as property, he could not in *trover* be held to have converted it.

It is, then, in the case before us, essential to inquire whether the defendant knew Frank to be a slave. If he did, his acts of interference may amount to an assertion of his right as owner, and the consequence of these acts may be damages which have resulted from his conversion. But if he did not, the treatment of Frank as a servant, and consequent facilities of escape afforded to him, may have been acts in themselves lawful — certainly did not indicate an assertion of property.

A new trial is therefore ordered.

RICHARDSON, O'NEALL, BUTLER, and FROST, JJ., concurred.<sup>6</sup>

<sup>1</sup> 8 Cowen, 43.

<sup>2</sup> Rice, 60.

<sup>3</sup> 1 Speers, 182.

<sup>4</sup> 2 Bulst. 280.

<sup>5</sup> 4 Esp. 165.

<sup>6</sup> Quay v. M'Ninch, 2 Mill C. R. 78 *Accord.* — ED.

## THOROGOOD v. ROBINSON.

IN THE QUEEN'S BENCH, JANUARY 15, 1845.

[Reported in 6 Queen's Bench Reports, 769.]

CASE for an excessive distress, with a count in trover, for lime, flints, and breeze. Pleas: To the count in trover 1, Not guilty; 2, Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord Denman, C. J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a lime-burner, and, in January, 1844, was in possession of some land, and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who at the time were loading a barge there with part of the lime. He refused to let them do anything to the kiln fires, or put any more of the lime on the barge. The defendant's evidence showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

*Knowles* now moved for a new trial, on the ground that the verdict on both issues was against the evidence.<sup>1</sup>

LORD DENMAN, C. J. In leaving this case to the jury, I endeavored to act in conformity with the decision of this court in the case of *Needham v. Rawbone*,<sup>2</sup> and I said that it was a question for the jury whether the conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to deliver them, or to permit the plaintiff or his servants to remove them, there would have been a clear conversion;<sup>3</sup> but it does

<sup>1</sup> The argument for the plaintiff is omitted. — Ed.

<sup>2</sup> 6 Q. B. 771, n.

<sup>3</sup> *Badger v. Batavia Co.*, 70 Ill. 302 *Accord.* — Ed.

not necessarily result from the facts proved in this case that the defendant was guilty of a conversion.

PATTESON, J. The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods, or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

*Rule refused.*<sup>1</sup>

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### NICHOLS v. NEWSOM.

SUPREME COURT, NORTH CAROLINA, JUNE, 1813.

[*Reported in 2 Murphy, 302.*]

THIS was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, but not banked or turfed. Upon the trial it appeared that a judgment had been obtained against the defendant, on which an execution was issued and levied on the said lightwood, which was duly advertised and sold and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf, and burn the kiln as it then stood, which liberty the defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose, he would sue him. There was no evidence of an actual conversion, and at the time the suit was commenced, the kiln remained in the same situation in which it was when purchased by the plaintiff. The plaintiff was permitted to take a judgment for twenty pounds, the value of the kiln, with leave to the defendant to have the verdict set aside and a nonsuit entered, provided the court should be of opinion the plaintiff was not entitled to recover in this action, on the foregoing facts, and on motion of the defendant, the case was transmitted to this court for the opinion of the judges. On this case the court were divided in opinion.

HALL, J. The lightwood which is the subject-matter of this action was legally levied upon and sold to the plaintiff. That sale gave the plaintiff a title to it. The kiln of lightwood could not be delivered and carried away like most other kinds of personal property; it was cumbersome, and could only be removed in the manner proposed by the

<sup>1</sup> See *Towne v. Hazen*, 51 N. H. 596; *Hamilton v. Caldwell*, 23 N. Br. 373. — ED.

plaintiff. If so, he had a right to remove it in that manner, and the defendant had no right to forbid him. Of course the plaintiff's right was not impaired by the defendant's threat to sue him if he entered upon his land and removed the lightwood; his physical power to do himself justice still remained. Had that been opposed, then there would have been a conversion. Had the defendant sued the plaintiff for carrying away the lightwood, he could not have recovered, because the plaintiff only did that which the law gave him a right to do, that was, to enter on the defendant's land and carry away property to which he had acquired a title by a purchase under an execution, property which could be removed in no other way. The threats which defendant made were of no legal significance, and ought to have been disregarded by the plaintiff. If the lightwood had been within the defendant's enclosures, and admittance had been denied, the case might have been different; but being in the woods, and no barrier interposed, the idle threat of defendant could not amount to a conversion, and the rule for a new trial, I think, ought to be made absolute.<sup>1</sup>

LOWRIE, J., delivered the opinion of the majority of the court.<sup>2</sup>

The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood was a chattel of this description, and the purchase under the execution vested in the plaintiff a right to it. The lightwood, however, being bulky, and too cumbersome to be immediately moved from the defendant's land on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent and in his possession until the necessary arrangement could be made for taking it away. In all cases where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever, therefore, a man purchases heavy articles at a sheriff's sale, such as corn, fodder, hay-stacks, &c., which it is not presumable he is prepared immediately to take away, he may, if not prohibited by the debtor, return in a peaceable manner and lawfully enter upon the freehold, or into the enclosures of such debtor, or other person on whose land such articles were sold, for the purpose of taking them away. But in the present case such presumption ceased to exist the moment the defendant expressly prohibited the plaintiff from entering upon his freehold, and threatened him with a suit if he did enter. After such express prohibition the entry of the plaintiff could not be a peaceable and lawful one. The law will not permit one man to enter upon the possession of another for the assertion of a mere private right which he may have to an

<sup>1</sup> The concurring opinion of SEAWELL, J., is omitted — Ed.

<sup>2</sup> TAYLOR, C. J. LOCKE, LOWRIE, and HENDERSON, JJ.

article of personal property, against the express prohibition of him in possession; such permission would be attended with consequences very injurious to the peace of society. We therefore think that the refusal of the defendant, as stated in this case, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion." Com. Dig. Action on the Case, title Trover, E. This case differs from that to be found in Gilbert's Law of Evidence, 262, and in 5 Bac. Abr. Trover, B, where there was a refusal to deliver a beam of timber; for here was not only a refusal to deliver, but a refusal to suffer the plaintiff to take the lightwood into his possession and cart it away, coupled with a declaration that, if the plaintiff entered upon his freehold for that purpose, he would sue him. The plaintiff was under no necessity to enter upon the defendant's land, and thereby incur the trouble and expense of a lawsuit. We therefore think the rule for a new trial should be discharged.

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### BRISTOL v. BURT.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1810.

[*Reported in 7 Johnson, 254.*]

THIS was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga circuit, the 7th June, 1810, before the Chief Justice.

The defendant was, in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the first July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent from thence to a British port. The defendant at the same time promised the plain-

tiff that if he did not receive instructions to the contrary from the Secretary of the Treasury, within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty, and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had a control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store, without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place 180 dollars per ton, and that the expense of transportation was 4 dollars per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was 173 dollars per ton, but would not sell at Salina, in the county of Onondaga, for more than 150 dollars. That when the plaintiff received the ashes, the price of them, in the city of Albany, was 137 dollars and 50 cents, and the expense of transportation from 25 to 30 dollars per ton.



The Chief Justice charged the jury, that in his opinion there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance, and at the time he received them. And the jury found a verdict for the plaintiff for 1,472 dollars and 20 cents.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

*Gold*, for the plaintiff, cited 6 East, 538 ; 6 Term Rep. 298 ; 1 Burr. 31.

*Cady*, contra, cited 5 Bac. Abr. 279, Trover (G) ; Bull. N. P. 44 ; 3 Salk. 284.

*Per Curiam*. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in *Baldwin v. Cole*, is a conversion ; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods ? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorp's Case* (cited in 2 Bulst. 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised ; but in the present case there were the highest and most unequivocal acts of dominion and control over the property, not only by claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was therefore bringing a charge upon the plaintiff ; and this, says Mr. Justice Buller, in *Syeds v. Hay*,<sup>1</sup> amounts to a conversion. Neither the case of *M'Combie v. Davies*, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives or is inconsistent with such right, amounts in law to a conversion.

<sup>1</sup> 4 T. R. 260.

It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion that the motion to set aside the verdict must be denied. *Motion denied.*<sup>1</sup>

## ENGLAND v. COWLEY.

IN THE EXCHEQUER, JANUARY 16, 1873.

[*Reported in Law Reports, 8 Exchequer, 126.*]

TROVER for household furniture. Plea: Not guilty by statute (11 Geo. II. c. 19, § 21). Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following.

<sup>1</sup> Chapman v. Allen, Cro. Car. 271; Brennan v. Currint, Sayer, 224; Dewell v. Moxon, 1 Taunt. 391; Pattison v. Robinson, 5 M. & Sel. 105; Wilton v. Girdlestone, 5 B. & Ald. 847; Sharp v. Pratt, 3 C. & P. 34; Clendon v. Dinneford, 5 C. & P. 13; Cranch v. White, 1 B. N. C. 414; Wansbrough v. Maton, 4 A. & E. 884; Sylvester v. Craig (Colo. 1892), 31 Pac. R. 387; Thompson v. Rose, 16 Conn. 71; Clark v. Hale, 34 Conn. 398; Maxwell v. Harrison, 8 Ga. 67; Hale v. Barrett, 26 Ill. 195; Ring v. Billings, 51 Ill. 475; Hipple v. De Puie, 51 Ill. 528; Nor. Trans. Co. v. Sellick, 52 Ill. 249; Pullen v. Bell, 40 Me. 314; Neal v. Hanson, 60 Me. 84; Buel v. Pumphrey, 2 Md. 261; Chamberlin v. Shaw, 18 Pick. 278; Magee v. Scott, 9 Cush. 148; Folsom v. Manchester, 11 Cush. 334; Boston Acid Manuf. Co. v. Moring, 15 Gray, 211; Hinckley v. Baxter, 13 All. 139; Cox v. Cook, 14 All. 165; Bates v. Stansell, 19 Mich. 91; O'Donoghue v. Corby, 22 Mo. 393; Huxley v. Hartzell, 44 Mo. 370; Bradley v. Spofford, 23 N. H. 444; Dunlap v. Hunting, 2 Den. 643; Farrar v. Chauffetete, 5 Den. 527; Hall v. Robinson, 2 N. Y. 293; Tuttle v. Gladding, 2 E. D. Smith, 157; Solomon v. Waas, 2 Hilt. 179; Chambers v. Lewis, 28 N. Y. 454; Hare v. Pearson, 4 Ired. 76; McDaniel v. Nethercut, 8 Jones, 97; Berry v. Vantries, 12 Serj. & R. 89; Harger v. M'Mains, 4 Watts, 418; Ratcliff v. Vance, 2 Mill's Const. R. 239; Fowler v. Stuart, 1 McCord, 504; Trowell v. Youmanes, 5 Strobb. 67; Roach v. Damron, 2 Humph. 425; Irish v. Cloyes, 8 Vt. 30; Albee v. Cole, 39 Vt. 319; Leonard v. Belknap, 47 Vt. 602; Vilas v. Mason, 25 Wis. 310 *Accord.* — Ed.

One of the men returned and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them, in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up, the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favor of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for £40, the value of the goods, if the court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

*Holl* showed cause.

*Joyce*, in support of the rule.<sup>1</sup>

POLLOCK, B. I am of opinion that this rule should be discharged. The defendant was never in possession of the goods. No doubt cases might be put where a wrong-doer, though not in actual possession, uses such force or contrivance as to interfere entirely with the dominion of the true owner; but here there was a mere assertion of right on the defendant's part. I think the plaintiff should have insisted upon removing the goods, if he intended afterwards to challenge the defendant's assertion in an action of trover. It is a sound rule of law which is laid down in *Co. Litt.* 253 *b*, where continual claim is treated of, that it is not every cause of fear which can excuse a person from not claiming his rights. The fear must not be a "vain feare." It must be "some just cause of feare." Now in this case the plaintiff proved no act of interference, but only a threat, which the plaintiff, if he meant afterwards to stand by his rights, ought to have resisted. Mr. Joyce has urged that the defendant detained the plaintiff's goods; but in fact he never had them to detain. He merely said, "You shall not remove them." That is not enough to furnish ground for this action.

<sup>1</sup> The arguments of counsel are omitted. — Ed.

BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did not act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But, further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common-law Procedure Act, 1852, and although, in the form of declaration there given in sch. B, the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods, or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back;" and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is, that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff; he must say that nothing shall. Now here there was no interference with the plaintiff's rights, except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover

their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favor of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1827, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but, in order to have the opportunity of distraining, he told the plaintiff he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C. B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to show how absurd would be the consequences of so holding. For instance, suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Some one interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from

mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of *Fowler v. Hollins*, the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in *Wilbraham v. Snow*,<sup>1</sup> the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my Brother Martin, of *Fouldes v. Willoughby*, really assist the plaintiff; for the *dictum* of Alderson, B., which at first sight appears to favor his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

*Rule discharged.*<sup>2</sup>

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### HIORT v. BOTT.

IN THE EXCHEQUER, FEBRUARY 12, 1874.

[*Reported in Law Reports, 9 Exchequer, 86.*]

ACTION of trover for barley, tried before Archibald, J., at the Staffordshire summer assizes, 1873.

The facts were as follows: The plaintiffs, who were corn merchants, trading under the name of Brochner & Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, forwarded to the London and North-western Railway station at Birmingham eighty-three quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to

<sup>1</sup> 2 Notes to Saund. by Wms. 87.

<sup>2</sup> *Boobier v. Boobier*, 39 Me. 406; *Polley v. Lenox Iron Works*, 2 All. 184; *Platner v. Johnson*, 26 Miss. 142 *Accord*.

Compare *Guthrie v. Jones*, 108 Mass. 191; *Crockett v. Beaty*, 8 Humph. 20. — ED.

the order of consignor or consignee." The barley had, in fact, never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you of Brochner & Co." Grimmett said, "It was a mistake of Brochner & Co.; they had, no doubt, confused the defendant's name and some other name; they were doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £180, the value of the barley. A rule having been obtained accordingly,

Feb. 10. *Jelf* (*Powell*, Q. C., with him), showed cause.

*Bosanquet* (*Huddleston*, Q. C., with him), in support of the rule.<sup>1</sup>

*Curr. adv. vult.*

Feb. 12. The following judgments were delivered:—

BRAMWELL, B. This case was argued before my brothers Pigott and Cleasby and myself, and we are all of opinion that the rule must be made absolute.

I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use;" but that does not mean that the defendant consumed the goods himself; for if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And

<sup>1</sup> The arguments of counsel and the concurring opinion of CLEASBY, B., are omitted. — Ed.

there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus, that by an unauthorized act on the part of the defendant the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me, therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out.

- Various ingenious cases were put as to what would happen if, for instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street? That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it, — that is, to send it back by a trustworthy person? And when you say, “Go and deliver it to the person who sent it,” are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett’s request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is, therefore, a distinction between the case put and the present one. And there is also a distinction between the case of *Heugh v. London and North-western Ry. Co.*,<sup>2</sup> which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: “We, the plaintiffs, had at the London and North-western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing

<sup>1</sup> L. R. 5 Ex. 51.



with it. Nevertheless, you ordered the London and North-western Railway Company to deliver it, without any authority, to Grimmett, who took it away." Would not that have been a logical and precise statement of a tortious act on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> Hawkes v. Dunn, 1 Cr. & J. 519; Hoare v. Great West. Co., 37 L. T. Rep. 186; Stewart v. Frazier, 5 Ala. 114; Lichtenstein v. Boston Co., 11 Cush. 70; Hall v. Boston Co., 14 All. 439; Fitzgerald v. Burrill, 106 Mass. 446; Jenkins v. Bacon, 111 Mass. 373; Kowing v. Manley, 49 N. Y. 192 *Accord.* See Purcell v. Jaycox, 3 Th. & C. 406. — ED.

SECTION II. (*continued.*)

## (h) DEMAND AND REFUSAL.

## BALDWIN v. COLE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., 1704.

[*Reported in 6 Modern Reports, 212.*]

TROVER. The case, upon evidence, was this : —

A carpenter sent his servant to work for hire to the queen's yard ; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

HOLT, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden ;<sup>1</sup> for what is a conversion but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them ; so the taking and carrying away another man's goods is a conversion ; so if one come into my close, and take my horse and ride him, there it is conversion ; and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages ; and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service and brought his own horse, that the property thereof was immediately altered and vested in the queen ; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest.<sup>2</sup>

<sup>1</sup> On a special verdict, finding only a demand and refusal, the court would not give judgment for the plaintiff. Chancellor's Case, 10 Rep. 56 *b*; Isaac v. Clark, 2 Bulst. 308; Mires v. Solebay, 2 Mod. 242; Morris v. Pugh, 3 Burr. 1243; Cutter v. Fanning, 2 Iowa, 580; Daggett v. Davis, 53 Mich. 35; Hill v. Covell, 1 N. Y. 522. But see Eason v. Newman, Cro. El. 495. — ED.

<sup>2</sup> Watkins v. Woolley, Gow, 69; Davies v. Nicholas, 7 C. & P. 339; McCormick v. Pennsylvania Co., 49 N. Y. 303, 80 N. Y. 353, 99 N. Y. 65; Montanye v. Montgomery, 19 N. Y. Sup. 655; Doherty v. Madgett, 58 Vt. 323 *Accord*.

A demand of satisfaction for a chattel is regarded as a demand for the chattel. Rookey's Case, Clayt. 122; Thompson v. Shirley, 1 Esp. 31; La Place v. Aupoix, 1 Johns. Cas. 406. — ED.

## BOARDMAN v. SILL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS  
AFTER MICHAELMAS TERM, 1809.

[*Reported in 1 Campbell, 410.*]

TROVER for some brandy, which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney-General* contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But LORD ELLENBOROUGH considered that, as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt. *The plaintiff had a verdict.*<sup>1</sup>

## BURROUGHES v. BAYNE.

IN THE EXCHEQUER, FEBRUARY 10, 1860.

[*Reported in 5 Hurlstone & Norman, 296.*]

TROVER for a billiard table with the appurtenances. Pleas: first, not guilty; secondly, that the goods were not the plaintiff's. Whereupon issue was joined.

At the trial before Bramwell, B., at the sittings in London after Trinity term, it appeared that, in July, 1857, the billiard table in ques-

<sup>1</sup> Knight v. Harrison, Saunders's Pl. & Ev. 641; Boardman v. Sill, 1 Camp. 410; Wilson v. Anderton, 1 B. & Ad. 750; Thompson v. Trail, 6 B. & C. 36; Dirks v. Richards, 4 M. & Gr. 574; Caunce v. Spanton, 7 M. & Gr. 903; Catterall v. Kenyon, 3 Q. B. 310; Jones v. Tarleton, 9 M. & W. 675; Lee v. Bayes, 18 C. B. 599; Weeks v. Goode, 6 C. B. N. S. 367; Hinckley v. Baxter, 18 All. 139; Doty v. Hawkins, 6 N. H. 247; Clark v. Rideout, 39 N. H. 238; Wykoff v. Stevenson, 46 N. J. 326; Judah v. Kemp, 2 Johns. Cas. 411; Everett v. Saltus, 15 Wend. 474; Saltus v. Everett, 20 Wend. 267; Holbrook v. Wight, 24 Wend. 169; Rogers v. Weir, 34 N. Y. 463; Ball v. Liney, 48 N. Y. 6; Carroll v. Mix, 51 Barb. 212; Dowd v. Wadsworth, 2 Dev. 130; Buckley v. Handy, 2 Miles, 449; Jacoby v. Lanssatt, 6 S. & R. 300; Wagenblast v. M'Kean, 2 Grant, 393; Andrews v. Wade, 6 Atl. R. 48; Williams v. Smith (Pa. 1893), 25 Atl. R. 1122; Bean v. Bolton, 3 Phila. 87, 93; Singer Co. v. King, 14 R. I. 511; West v. Tupper, 1 Bail. 193 *Accord.*

Compare Scarfe v. Morgan, 4 M. & W. 270; White v. Gainer, 1 C. & P. 324; s. c. 2 Bing. 23; Spence v. McMillan, 10 Ala. 583; Thompson v. Rose, 16 Conn. 85; Hanna v. Phelps, 7 Ind. 21; Dows v. Morewood, 10 Barb. 183. — Ed.

tion had been hired of the plaintiff by one Filmer, who kept a hotel in Harley Street, Cavendish Square.

The table remained in Filmer's possession till the 7th of March, 1859, when a further agreement was drawn up, indorsed on the first agreement, and executed by Filmer.

This agreement was never completed. At the beginning of April the plaintiff demanded the billiard table of Filmer, when he found that a bill of sale had been executed by Filmer to the defendant, under which the defendant's man was in possession of the goods in Filmer's house. The billiard table was included in the bill of sale. On the 13th of April a clerk of the plaintiff's attorney served on the defendant at his house in Brook Street, a formal demand of the billiard table. The defendant asked to see the agreement, which the plaintiff's son accordingly produced to him on the next day. The defendant then asked for a copy, that he might consult his attorney, but the plaintiff would not allow a copy to be taken. The plaintiff's son deposed that the defendant seemed at first willing to give up the table, but afterwards, on reading the two agreements, said, "If it was a hiring only, he would give up the table, but it appeared to be a purchase. The table was in the inventory, and, unless the plaintiff could prove that it was his, he would stick to it." The plaintiff then caused notices to be served on the defendant and the man in possession that on the following morning, the 15th of April, at twelve o'clock, he would call to fetch away the table. The plaintiff and his men called on the next day at Filmer's house in Harley Street at the time appointed and saw the man in possession, but could not obtain the billiard table, the door of the billiard-room being locked. The plaintiff never got the billiard table, which was ultimately seized and sold by the landlord under a distress for rent. The defendant swore that on the morning of the day last mentioned he had given instructions to the man in possession not to detain the table. The man in possession said that he told the plaintiff that he might have the table, but he could not find the key of the room in which it was. The jury found a verdict for the plaintiff.

*Petersdorff*, Serjt., in Michaelmas term, obtained a rule for a new trial, on the ground that there was no evidence of a conversion, and that the verdict was against the evidence.

*C. E. Pollock* showed cause (February 9).

*Petersdorff*, Serjt., in support of the rule.<sup>1</sup>

*Cur. adv. vult.*

The following judgments were now pronounced:—

MARTIN, B. The question in this case was, whether there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of

<sup>1</sup> The arguments of counsel and the opinion of CHANNELL, B., who agreed with MARTIN, B., are omitted. — ED.

things. First, the action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law; and the consequence was that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat the plaintiff. In consequence of this, the courts of law in very early times invented the action of trover. They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the defendant; and thus they gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover, — an action devised for the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of *indebitatus assumpsit* was the same. For the purpose of preventing the wager of law in an action to recover a debt, the courts devised the action of *indebitatus assumpsit*, wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This, I believe, was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion;" they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases, the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In

*Wilbraham v. Snow*<sup>1</sup> there is a note of Serjeant Williams, which, I apprehend, is as good an authority on this subject as exists. He says: "So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held, by Holt, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion," in reference to this action, and the same rule has been laid down in modern times. There is a case, *Fouldes v. Willoughby*, which I have long considered, and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value. The court were of opinion that it did not; and the distinction between the action of trespass and trover was much discussed. Alderson, B., in delivering his judgment, says: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely accede to this view of the law, which is simple and of easy application.

Apply it to this case. The facts were these: A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by Alderson, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this: The plaintiff went to the defendant and showed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said, in effect, "You are not entitled to it," and he did not deliver it up. In the

<sup>1</sup> 2 Wms. Saund. 47 g.

evening the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly the plaintiff did send, and could not get it, it being locked up. In the mean time the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice; and I think it was the duty of the defendant to be ready to give it to him when he came for it. The consequence was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed the jury to find a verdict for the plaintiff, if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged.

BRAMWELL, B. I think, if anything was necessary to show the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term "conversion." It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. As to this particular case, I think there was no misdirection; certainly, in a technical sense, there was not; because, if the plaintiff's account is true, there was evidence of a conversion, — he demanded the goods, and could not get them. But, I think, if the jury acted upon that, they acted upon erroneous evidence, and that they ought to have acted on the evidence of the defendant; and, therefore, if my learned brothers had taken the same view of the evidence as I do, I should have thought a new trial ought to have been granted. But I protest against the notion that, because the judge who tried the cause says he is dissatisfied with the verdict, therefore a new trial should be granted. That ought not to be unless there are reasonable grounds for that dissatisfaction. Inasmuch as I have not been able to persuade my brothers that my grounds are reasonable, I think that they are right in discharging the rule. But I confess I think the verdict was against the evidence. I cannot say there was not evidence to go to the jury of a conversion of the goods, but I think the verdict was against the evidence. It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. Parke, B., in *Clark v. Chamberlain*,<sup>1</sup> said: "If, instead of insisting upon salvage being paid, the defendant had said, 'I do not know whether salvage is due or not; I shall keep them until that is ascertained,' he would not have been guilty of a conversion." In such cases, it would be monstrous to

hold that a man had not a right to make reasonable inquiries. It cannot be that, if I pick up a watch in the street, and another person says, "that is mine," I am bound at once to deliver it up. I may say, "It may be, but I will not give it to you before you tell me the name of the maker;" and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it; but I do not believe it is. The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use; because, what matters it, to one who may be the owner of the goods, how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it. He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-room; and does nothing to it but let it hang there: that is, to all intents and purposes, a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire to a person who had lawful possession of it, and who might hand it over to the defendant without the defendant being a trespasser or wrong-doer therein. There was no suggestion that he got possession of it wrongfully; but, having got possession of it lawfully, and never having removed it from the place where it was originally placed, and, in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Show me how it is yours; bring the contract of hiring." The contract of hiring is brought; the defendant sees a writing on the back of it, which tends to show it was a sale; and then asks for a copy, in order that he may take advice upon it; the plaintiff, instead of doing as he properly might have done according to my view, says: "I shall not; the table is mine; you may give it to me or not; but I shall treat it as a refusal." It turns out that he himself put the true color on the transaction, by sending a formal notice, and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened that the defendant had given up the nominal possession; and the person who had the actual custody had locked up the room, and the plaintiff could not get the table; he went away, and five or six days afterwards the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion of the table to the



defendant's own use. An attempt was made by my Brother Martin to render this word "conversion" intelligible. But it ought to be borne in mind that in the forms of pleading given in the appendix to the Common-law Procedure Act of 1852 (the 15 & 16 Vict. c. 76), this is the form of the count in trover: "That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say," &c. So that the Legislature has put a meaning on the word "conversion." If the complaint had been that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, the answer might well be, "I did not continue to detain them; you might have had them, but you would not wait. If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing." Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard table, which he cannot recover from anybody else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was matter of discussion up to the time when the plaintiff was informed the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion. For these reasons I think that the verdict was against the evidence; but, in so saying, I desire to add that in my opinion it is not merely because the judge who tried the cause comes to a different conclusion from the jury upon the facts, that a new trial should be granted; but that where it appears to the court that the view taken by the judge is wrong he should be set right, as on the present occasion, by being overruled.

*Rule discharged.*<sup>1</sup>

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### GREEN v. DUNN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS  
AFTER MICHAELMAS TERM, 1811.

[*Reported in 3 Campbell, 215.*]

TROVER for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier.

The plaintiff, to whom the timber belonged, having demanded it of

<sup>1</sup> See *Fothergill v. Dovegrove*, 2 F. & F. 132; *Cox v. Cook*, 14 All. 165; *Cargill v. Webb*, 10 N. H. 199; *Durell v. Mosher*, 8 Johns. 445; *Mitchell v. Williams*, 4 Hill, 13; and compare *Towne v. Lewis*, 7 C. B. 608. — ED.

the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else."

LORD ELLENBOROUGH. This is a qualified refusal, and no evidence of conversion. *Plaintiff nonsuited.*<sup>1</sup>

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### ALEXANDER v. SOUTHEY.

IN THE KING'S BENCH, NOVEMBER 14, 1821.

[*Reported in 5 Barnewall & Alderson, 247.*]

TROVER for printing-types and other goods. Plea: General issue. At the trial, at the last Guildhall sittings, before Best, J., it appeared that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the company. The only evidence of a conversion was that, when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion office. The learned judge left it to the jury to say whether this qualification of the defendant's refusal was a reasonable one, telling them that, if so, he was of opinion that there was not sufficient evidence of a conversion. The jury, accordingly, found a verdict for the defendant. And now

*Denman* moved for a new trial, on the ground of a misdirection.<sup>2</sup>

ABBOTT, C. J. I am of opinion that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Elwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use; but here the question is whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BAYLEY, J. If the plaintiff in this case had informed the defendant that he had previously made application to the insurance company, and that they had refused permission for the delivery of the property, or had told the defendant that he expected him to go and get an order authorizing the delivery of the property, and after that the defendant

<sup>1</sup> *Solomons v. Dawes*, 1 Esp. 83; *Gunton v. Nurse*, 2 B. & B. 447; *Robinson v. Burleigh*, 5 N. H. 225; *Jacoby v. Laussatt*, 6 S. & R. 300 (*semble*); *Singer Co. v. King*, 14 R. I. 511 *Accord*.

Compare *Connah v. Hale*, 23 Wend. 471. — Ed.

<sup>2</sup> The argument for the plaintiff is omitted. — Ed.

had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part; but here the defendant had the goods in his possession as the agent of the insurance company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

HOLROYD, J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the insurance company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully; and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now, it is clear that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay*<sup>1</sup> is an authority in point. There the servant refused to deliver back some sheep which were on his master's land, and it was held to be no conversion on his part. I am, therefore, of opinion that the rule should be refused.

BESR, J. I thought at the trial that I might properly have nonsuited the plaintiff, but that the safer course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

*Rule refused.*<sup>2</sup>

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## VAUGHAN v. WATT.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson & Welsby, 492.]

TROVER for different articles of wearing apparel, &c. Pleas: first, not guilty; secondly, that the goods were not the property of the plaintiff; on which issues were joined. At the trial before Rolfe, B.,

<sup>1</sup> 2 Mod. 242.

<sup>2</sup> *Philpott v. Kelley*, 3 A. & E. 106; *Ingalls v. Bulkley*, 15 Ill. 224; *Ward v. Moffett*, 38 Mo. Ap. 395; *Mount v. Derick*, 5 Hill, 455; *Blankenship v. Berry*, 28 Tex. 448 *Accord*.

See also *Clark v. Chamberlain*, 2 M. & W. 78. — Ed.

at the Middlesex sittings in Hilary Term, the following appeared to be the facts of the case: On the 24th July, 1839, the goods in question were pledged with the defendant, a pawnbroker, by a female of the name of Hubbard, in the name (as the defendant understood it) of Mary Warne, and the duplicate was so made out. On the next day he was sent to by that person (whom he did not then know, but who afterwards proved to be the plaintiff's wife), to say that she had lost the duplicate, and she demanded and obtained from him a copy thereof, and also a form of a declaration of the loss of it, pursuant to the Stat. 39 & 40 Geo. III., c. 99, § 16, and 5 & 6 Will. IV., c. 62, § 12. Some days afterwards, upon an allegation that this document also was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to the police magistrate at Hatton Garden, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance on the following day, when he attended accordingly, but was compelled to go away before the case was called on. On the 9th, however, the parties again attended before the magistrate; and the plaintiff then stated that it was his wife by whom the goods had been pledged. The magistrate, however, after hearing the circumstances, declined to interfere. The plaintiff then brought this action, the writ being sued out on the 21st August. It was contended for the defendant that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might in that case never have it in his power to recover possession of them; and, under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit. The jury were discharged as to the second issue.

*G. T. White* having accordingly obtained a rule for a nonsuit, or for a new trial (citing *Isaac v. Clark*,<sup>1</sup> and *Green v. Dunn*),

*Pike* now showed cause.<sup>2</sup>

PARKE, B. The learned judge was incorrect in telling the jury that the mere refusal to deliver the goods to the real owner was a conversion. It was a question for the jury, whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title

<sup>1</sup> 2 Bulst. 312.

<sup>2</sup> The arguments of counsel, and the concurring opinions of Lord Abinger, C. B., and Rolfe, B., are omitted. — ED.

to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought therefore to have been left to the jury, whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed. The party obtaining the declaration is bound to go before a magistrate, and satisfy him by evidence that he is the real owner of the goods; and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of August, for a supposed defect of title. That was a question for the jury. The statute supposes that the party will go before the magistrate immediately; and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed. But it is all for the jury; however strong the facts, the judge cannot take it upon himself to refuse to leave the question to them. Therefore, although the result will clearly be the same, in strict law the defendant is entitled to have the facts submitted to the jury. There must therefore be a new trial.<sup>1</sup>

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SMITH, ASSIGNEE OF TENANT, A BANKRUPT, v. YOUNG.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., NOVEMBER 1, 1808.

[Reported in 1 Campbell, 439.]

TROVER for a lease assigned by the bankrupt to the defendant after an act of bankruptcy.

The witness, to prove the demand, stated that he had verbally required the defendant to deliver up the lease, and at the same time served upon him a notice in writing to the like effect.

When the lease was demanded, the defendant said, "he would not deliver it up; but it was then in the hands of his attorney, who had a lien upon it for a small sum of money due him."

Garrow, for the plaintiff, contended that the attorney's possession of the lease was in law the possession of the defendant, who must be considered as having a complete control over it, and that the lien did not,

<sup>1</sup> Pillot v. Wilkinson, 3 H. & C. 345; Watt v. Potter, 2 Mason, 77; Zachary v. Pace, 9 Ark. 212; Witherspoon v. Blewett, 47 Miss. 570; Robinson v. Burleigh, 5 N. H. 225; Fletcher v. Fletcher, 7 N. H. 452; Cushing v. Breck, 10 N. H. 116; Thomson v. Sixpenny Sav. Bank, 5 Bosw. 293; Rogers v. Weir, 34 N. Y. 463; McEntee v. N. J. St. Co., 45 N. Y. 34; Ball v. Liney, 48 N. Y. 6; Monnot v. Ibert, 33 Barb. 24; Carroll v. Mix, 51 Barb. 212; Roberts v. Yarboro, 41 Tex. 453 (*semble*) *Accord.*

See Leighton v. Staples, 8 N. H. 359; Corey v. Bright, 58 Pa. 70; Singer Co. v. King, 14 R. I. 511, 512.—Ed.

under these circumstances, prevent the refusal to deliver up the deed from amounting to a conversion.

LORD ELLENBOROUGH. The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded.

*Plaintiff nonsuited.*<sup>1</sup>

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JACOB CARPENTER, APPELLANT, v. THE MANHATTAN  
LIFE INSURANCE CO., RESPONDENT.

IN THE SUPREME COURT, NEW YORK, SEPTEMBER TERM, 1880.

[*Reported in 22 Hun, 47.*]

BARNARD, P. J.<sup>2</sup> This is a hard action. The plaintiff was the owner of some hot-house plants which remained upon defendant's premises by its assent, and to accommodate the plaintiff. The plaintiff was notified to remove them, and he delayed doing so for a considerable time; but when he did endeavor to get them, the defendant refused to deliver them to the plaintiff. This was on Saturday, May 17, 1879. On Monday following, the defendant told the plaintiff he might have the plants. On Tuesday, May 20, 1879, this suit was commenced [for the conversion of the plants]. The court charged the jury that the plaintiff was entitled to recover the difference between the market value of the property on Saturday and on Monday, when they were tendered back. We think in this charge the court erred. The conversion was made out by a refusal to deliver the property on Saturday. The plaintiff's right of action was then complete, and could not be destroyed without his consent. If, after a conversion, the goods are received back, either before or after suit brought, it goes to mitigate

<sup>1</sup> Horwood v. Smith, 2 T. R. 750; Canot v. Hughes, 2 Bing. N. S. 451; Lindsay v. Cundy, 1 Q. B. D. 348; Williams v. Russell, 39 Conn. 409; Robinson v. Hartridge, 13 Fla. 501; Davis v. Buffum, 51 Me. 160; Dearbourn v. Nat. Bank, 58 Me. 273; Hagar v. Randall, 62 Me. 439; Dietus v. Fuss, 8 Md. 148; Wellington v. Wentworth, *post*, p. 380; Johnson v. Couillard, 4 All. 446; Pitlock v. Wells, 109 Mass. 452; Lockwood v. Bull, 1 Cow. 322; Packard v. Getman, 4 Wend. 613; Hawkins v. Hoffman, 6 Hill, 586; Hill v. Covell, 1 N. Y. 522; Nat. Bank v. Wheeler, 48 N. Y. 492; Gillet v. Roberts, 57 N. Y. 28; Bowman v. Eaton, 24 Barb. 528; Whitney v. Slauson, 30 Barb. 276; Hunt v. Kane, 40 Barb. 638; Hoover v. Alexander, 1 Bail. 510; Robertson v. Wurde-man, Dudley, 234; Morris v. Thompson, 1 Rich. 65; Knapp v. Winchester, 11 Vt. 351 *Accord*.

See also Verrall v. Robinson, 2 Cr., M. & R. 495; Catterall v. Kenyon, 3 Q. B. 310; Edwards v. Hooper, 11 M. & W. 363; Jenner v. Joliff, 6 Johns. 9; Jenner v. Joliff, 9 Johns. 381; Rogers v. Weir, 34 N. Y. 465-467. — Ed.

<sup>2</sup> Only the opinions of the court are given. — Ed.

the damages, and no further.<sup>1</sup> A party whose goods are converted, cannot be forced to receive them back. *Livermore v. Northrup*,<sup>2</sup> *Reynolds v. Shuler*.<sup>3</sup> The judgment should therefore be reversed, and a new trial granted, costs to abide event.

DYKMAN, J. I concur with reluctance.

GILBERT, J., dissented.

*Judgment and order denying new trial reversed, and new trial granted; costs to abide event.*<sup>4</sup>

<sup>1</sup> 1 Sedgwick, Damages (8th ed.), 76; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Watson v. Coburn* (Neb., 1892), 53 N. W. R. 477; *Stillwell v. Farwell* (Vt., 1892), 24 Atl. R. 243 *Accord.* — ED.

<sup>2</sup> 44 N. Y. 107.

<sup>3</sup> 5 Cow. 323

<sup>4</sup> On principle, and by the earlier English decisions, an unaccepted tender of the converted goods was no ground for reducing the amount of the plaintiff's recovery for the conversion. *Wilcock's Case*, 2 Salk. 597; *Bovington v. Parry*, 2 Stra. 822; *Watkinson v. Cockshot*, Cooke, Pr. Cas. 130. An opposite practice seems to have begun in 1731, *Tuney v. Clark*, Cooke, Pr. Cas. 59; 1733, *Billings v. Wilcocks*, Cooke, Pr. Cas. 59; 1739, *Cooke v. Holgate*, Pr. Reg. 260; Barnes, Notes, 281; Cooke, Pr. Cas. 130, s. c. But these cases were disregarded, and the old common law rule followed in *Olivant v. Berino*, 1 Wils. 23, 2 Stra. 1191, s. c.; *Harding v. Wilkin*, Sayer, 120 (explaining *Catling v. Bowling*, Say. 80).

These cases were in turn overruled in 1762 by *Fisher v. Price*, 3 Burr. 1363, where Lord Mansfield and Mr. Justice Wilmot laid down the rule that "where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value; . . . there the specific thing demanded may be brought into court (and Mr. Justice Wilmot said this was the more reasonable, as this action of trover comes in the place of the old action of detinue)." Lord Mansfield's rule has since prevailed in England. 1796, *Pickering v. Truste*, 7 T. & R. 49; 1822, *Coombe v. Sanson*, 1 D. & Ry. 201; 1826, *Brunsdon v. Austin*, 1 Tidd Pr. (ed. 1824) 571; 1826, *Tucker v. Wright*, 3 Bing. 601; 1828, *Earle v. Holderness*, 4 Bing. 462; 1833, *Gibson v. Humphrey*, 1 Cr. & M. 544.

A tender of the converted chattel to the owner goes in reduction of damages in *Missouri and Vermont*, *Ward v. Moffett*, 38 Mo. App. 395; *Rutland Co. v. Bank*, 32 Vt. 639.

But the rule of the principal case prevails generally in this country. 1 Sedgwick, Damages (8th ed.), 74; *Comm. Bank v. Hughes*, 17 Wend. 91; *Otis v. Jones*, 21 Wend. 394, 396; *Higgins v. Whitney*, 24 Wend. 379, 380; *Brewster v. Silliman*, 38 N. Y. 423; *Baltimore Co. v. O'Donnell* (Ohio, 1892), 32 N. E. R. 476; *Whitaker v. Houghton*, 86 Pa. 48 (*semble*).

In *Hayward v. Seaward*, 1 M. & Sc. 459, where the facts were similar to those in the principal case, the court appear to have thought that the subsequent tender cured the original conversion. Such a view is plainly erroneous. The case must be supported, if at all, upon the ground suggested by *Bronson, J.*, in *Otis v. Jones*, 21 Wend. 396: "The case of *Hayward v. Seaward* does not proceed on the ground that a tort can be cured by a tender without acceptance, but on the ground that there had been no conversion of the property." See also *Gaughan v. St. Lawrence Co.*, 3 Ont. Ap. 392, 399; *Wells v. Kelsey*, 15 Abb. Pr. 53; *Savage v. Perkins*, 11 How. Pr. 17. — ED.

SECTION II. (*continued.*)

## (i) EXCUSABLE CONVERSION.

## DRAKE v. SHORTER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 9, 1803.

[*Reported in 4 Espinasse, 165.*]

TROVER for a boat. Plea of general issue.

The case stated on the part of the plaintiff was, that the defendant who was employed in an invention for making a vessel sail against wind and tide, had employed the plaintiff to work on her; that while the vessel was so working on, she took fire; that the defendant took a boat belonging to the plaintiff, to endeavor to extinguish it, but that she sunk, and was lost.

*Garrow*, for the defendant, stated his defence to be, that while the plaintiff was working on the vessel, it was his duty to have taken care of her, and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful.

LORD ELLENBOROUGH said, that if the fact was so, he thought it amounted to a defence; that what might be a tort under one circumstance, might, if done under others, assume a different appearance; as, for example, if the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.<sup>1</sup>

<sup>1</sup> COKE, C. J.: "There was a case resolved in the C. B. when I was there, concerning Gravesend barge, in which were a great number of passengers; one there had a pack of great value and of great weight in the barge. There suddenly happened a very great storm, and they were all in great danger, and were, for their own safety, enforced to throw out a great part of the goods for the safeguard of their lives which were then in the barge; amongst which goods, for the lightening of the barge, this pack of goods was thrown over; afterwards, he which was the owner of this pack, brought his action upon the case against the bargeman, for these his goods thus cast over; and we all there did resolve it clearly that this being the act of God, this sudden storm, which occasioned the throwing over of the goods, and could not be avoided, and for this cause he recovered nothing. The whole court agreed with him herein." *Bird v. Astock*, 2 Bulst. 280.

1 Roll. Ab. 6, pl. 5 (taking beds for the king's retinue); *Kennet v. Robinson*, 2 J. J. Marsh. 84 (caring for a neglected horse); *Jones v. Fort*, 9 B. & C. 764 (collecting bills of exchange to save loss); *Philpott v. Kelley*, 3 A. & E. 106 (bottling wine to save it); *Nelson v. Merriam*, 4 Pick. 249 (taking care of an estray); *Wilson v. McLaughlin*, 107 Mass. 587 (caring for an animal); *Perkins v. Ladd*, 114 Mass. 420 (sale



The defendant failed in proving the circumstances as to the ship being in the plaintiff's care; so that the accident of the fire proceeded from the defendant himself; and the plaintiff had a verdict.

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### STEVENS v. CURTIS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1836.

[*Reported in 18 Pickering, 227.*]

IN this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion.<sup>1</sup>

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### WELLINGTON v. WENTWORTH. ✓

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1844.

[*Reported in 8 Metcalf, 548.*]

TROVER for a cow. The parties submitted the case to the decision of the court on the statement of facts which follows:—

The defendants, inhabitants of Canton, in this county, being owners of pasture lands in New Hampshire, in May or June of each year, drive their own cattle to said lands, and also drive others' cattle, which they take to pasture at an agreed price, and in each autumn drive them back. In May or June, 1842, the defendants were jointly driving 151 head of cattle, of their own and of their neighbors', along the highway in Dorchester, where the plaintiff resides, and the plaintiff's cow unperceived by the defendants, and temporarily running at large in said highway, without a keeper, joined the cattle aforesaid, without the knowledge of the defendants. The defendants first stopped, at night, at Lexington, counted their drove, and found they had precisely the number they started with. They therefore supposed that they had all, and no more than their own and their neighbors' cattle, which they had taken to pasture. In fact, however, the defendants had lost one cow

of deceased soldier's perishable property); *Payne v. Robinson*, Harp. 279 (seizure and detention of slaves in insurrection); *Sharp v. Nesmith*, 6 Rich. 31 (seizure of chattel to prevent consummation of a fraud).

But see *McCarroll v. Stafford*, 24 Ark. 224 (seizure of chattel to save it from destruction. — ED.

<sup>1</sup> *Wilson v. McLaughlin*, 107 Mass. 587; *Bonney v. Smith*, 121 Mass. 155; *Tobin v. Deal*, 60 Wis. 87 *Accord.* — ED.

from their drove as they passed through Milton, but did not discover the loss until their return from New Hampshire. The plaintiff's cow was pastured in New Hampshire, by the defendants, during the season of 1842; and in the autumn of that year, as the defendants returned with their drove, they returned the plaintiff's cow to him, and he then received her. During said pasturing season, said cow had a calf, which was returned to the plaintiff with the cow.

The defendants, when they found the cow which was lost from their drove, as aforesaid, supposed that some of their neighbors had turned in one more cow than was reported, and never suspected that they had in their drove any cow that was not delivered to them to be pastured, until about four weeks after their return from New Hampshire, when the plaintiff called on them, at Canton, to make inquiries, and demanded his cow.

Defendants to be defaulted, if the plaintiff is entitled to maintain his action on the foregoing facts; otherwise, the plaintiff to become nonsuit.

*E. Ames*, for the defendants.<sup>1</sup>

No counsel appeared for the plaintiff.

SHAW, C. J. The court can perceive in this case no proof of a conversion. There was certainly no unlawful taking of the cow. On the contrary, it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendants' drove. Rev. Sts. c. 19, § 22; *Wild v. Skinner*.<sup>2</sup> Nor can we perceive any evidence of a conversion by a refusal to deliver the cow upon demand. For ought that appears, the cow was delivered on the first notice of the plaintiff that she was his property, and request to deliver her up; and we are to consider that such was the fact.

*Plaintiff nonsuit*.<sup>3</sup>

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## T. CLEGG v. BOSTON STORAGE WAREHOUSE CO. ✓

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1889.

[Reported in 149 Massachusetts Reports, 454.]

W. ALLEN, J. This is an action of tort against a warehouseman for the conversion of goods that belonged to the plaintiff, which were put in storage by him with the defendant. While in the defendant's warehouse, the goods were attached on a writ against a former owner of them as his property, and continued in the possession of the attaching officer under the attachment until they were replevied by another claim-

<sup>1</sup> The argument for the defendants is omitted. — Ed.

<sup>2</sup> 23 Pick. 251.

<sup>3</sup> *Van Valkenburg v. Thayer*, 57 Barb. 196 *Accord*.

*Platt v. Tuttle*, 23 Conn. 233 *Contra*. See *Hills v. Snell*, 104 Mass. 173; *Lee v. McKay*, 3 Ired. 29. — Ed.

ant. The conversion relied on is the delivery of the goods by the defendant to the attaching officer. It is conceded that the officer had no authority to attach them, and the question presented is, whether the facts stated show such delivery of the goods by the defendant as will constitute a conversion of them.

The goods were stored by the defendant in its warehouse, in a locked compartment, to which the defendant held the key. The attaching officer went to the warehouse with a writ of attachment against one Preston, and demanded access to the goods in order to attach them on the writ, declaring that they were the property of Preston. The defendant opened the door of the compartment where the goods were, and the officer took them on the writ. All the defendant knew in regard to the ownership of the goods was that they had that day been delivered at the warehouse by a teamster, who ordered them to be stored in the name of Thomas Clegg, and there is nothing to show want of good faith or of due care on the part of the defendant, except the fact that it opened the door on the demand of the officer. The plaintiff relies on the rule that delivery of goods by a warehouseman to a person not authorized to receive them is a conversion. See *Lichtenhein v. Boston & Providence Railroad*; <sup>1</sup> *Hall v. Boston & Worcester Railroad*.<sup>2</sup> It may be assumed that it is not necessary that there should be a manual delivery of the goods by the warehouseman, but that it is sufficient if they are taken from his possession by his permission, —if he voluntarily surrenders the possession of them.

In the case at bar, there was no actual delivery of the goods by the defendant, and the facts show that the taking was not by its permission, and that it did not voluntarily surrender the possession. If the goods had been taken by a stranger, under a claim of title, in the presence of the defendant's agents, without objection, the defendant might have been held to have permitted the taking; but it cannot be contended that a taking by legal process, by an officer of the law, into the custody of the law, was by the permission of the defendant, nor that the failure to resist or impede the officer was a voluntary surrender of the possession of the goods to him. It is true that the officer was liable as a trespasser to the owner of the goods, but it would not be on that account less true that he took them by virtue of his process, and not by the permission of the defendant, nor that the defendant, if it surrendered the possession to the officer, did it in submission to legal process, and not voluntarily. *Stiles v. Davis*,<sup>3</sup> In *Edwards v. White Line Transit Co.*,<sup>4</sup> in which it was held that a common carrier was liable on his contract as carrier for the failure to deliver goods that were taken from him under an attachment against a person not their owner, it is said, "In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the

<sup>1</sup> 11 Cush. 70.

<sup>2</sup> 1 Black. 101.

<sup>3</sup> 14 Allen, 439.

<sup>4</sup> 104 Mass. 159.

carrier, so as to subject him to the charge of converting it to his own use."<sup>1</sup>

The fact that the defendant exposed the goods to the officer, on his demand, does not show that the taking by him was by the permission or connivance of the defendant. The officer had a writ which authorized him to take the goods of Preston, and to break open doors for that purpose; he asserted his right, and declared his purpose to attach such goods in the warehouse in the defendant's possession as belonged to Preston, and demanded access to them. The defendant did not know whether the goods belonged to Preston or to the person in whose name they were stored, but that is immaterial. It was under no obligation if it had the right, and it had no power, to prevent the opening of the door and the taking of the goods by the officer. The facts that it opened the door with the key which was the only means of opening it without breaking, that it did not oppose or impede the officer in finding and taking the goods, or even that, on the demand of the officer, it pointed out to him the particular goods he was in search of, do not show any intention to give permission to the officer to take the goods, but submission to the legal process, and to the authority claimed and exercised by the officer under it.

The fact, that, while the goods were in the possession of the officer under the attachment, he did not remove them from the defendant's warehouse, but stored them there in charge of a keeper, and paid storage therefor to the defendant, does not show a conversion of the goods by the defendant.

On all the facts, we see no ground on which the defendant can be held liable.

*Judgment affirmed.*<sup>2</sup>

*E. M. Johnson*, for the plaintiff.

*F. L. Hayes*, for the defendant.

<sup>1</sup> The decision in *Edwards v. White Co.*, that a carrier, who surrenders goods to an officer having an attachment against one not their owner, though not liable in trover, is liable in contract, is at variance with the following cases: *Stiles v. Davis*, 1 Black, 101; *The M. M. Chase*, 37 F. R. 708 (*semble*); *Ohio Co. v. Yoke*, 51 Ind. 181; *Pingree v. Detroit Co.*, 66 Mich. 143 (in effect overruling *Gibbons v. Farwell*, 63 Mich. 344); *Jewett v. Olsen*, 18 Oreg. 419 (*semble*).—ED.

<sup>2</sup> *Edwards v. White Co.*, 104 Mass. 159, 162 *Accord*.

A refusal by a bailee to deliver to the owner his goods, on the ground that they have been taken on legal process in a proceeding against a third person, is not a conversion. *Verrall v. Robinson*, 2 C. M. & R. 495; *Catterall v. Kenyon*, 3 Q. B. 310; *Pillot v. Wilkinson*, 3 H. & C. 345; *Stiles v. Davis*, 1 Black, 101; *French v. Star Co.*, 134 Mass. 288. But see *Rogers v. Weir*, 34 N. Y. 463.—ED.

## WARING v. PENNSYLVANIA RAILROAD CO.

IN THE SUPREME COURT, PENNSYLVANIA, NOVEMBER 6, 1874.

[*Reported in 76 Pennsylvania Reports, 491.*]

ERROR to the Court of Common Pleas of Allegheny county: of October and November Term, 1874, No. 213.

This was an action of trover, commenced October 8th, 1868, by the Pennsylvania Railroad Company against Edward J. Waring.

MR. JUSTICE GORDON delivered the opinion of the court, January 4th, 1875<sup>1</sup>: —

Lord Mansfield defines the action of trover to be, “a remedy to recover the value of personal chattels wrongfully converted by another to his own use.”<sup>2</sup> The taking may have been lawful, hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them upon demand made. Ordinarily where such goods have been converted by the bailee, the law presumes it to be wrongful, and the action may be brought without a previous demand; but such presumption may be rebutted, showing a permission from the plaintiff to convert the property. So we may suppose a case of this kind: A. purchased a ton of wheat flour from B., a miller, B. delivers to A. a ton of wheat flour belonging to C., and A. converts it to his own use. Now it cannot be that B., as bailee of C., can maintain trover against A., without first explaining to him the mistake, and demanding of him a return of C.’s flour; for here the conversion is not wrongful, but permissive, there being nothing in the transactions which would lead A. to suppose that he had gotten any but his own property.

This example will apply to the case in hand. The defendant offered to prove that he had received from the railroad company no more car loads of oil than he was entitled to. This, as we understand the offer, not by way of recoupment, which was not permissible, but to show that he received the oil in good faith, supposing it to be his own. By his subsequent offers, he proposed to prove, that if he received the oil in dispute at all, it was by a delivery from the plaintiffs’ agents; if there was an error, it was produced by the plaintiffs, and finally that the defendant received the property “at the instance and request of the plaintiffs.”

The offers should not have been overruled. Had the proof therein proposed been produced, it is clear the plaintiffs had no case.

On such showing the defendant did no wrong, there was no wrongful conversion, and the action of trover would not lie. We observe no error in the charge, or in the answer to the points. Under the evidence,

<sup>1</sup> Only the opinion of the court is given. —ED.

<sup>2</sup> 1 Chit. Plead. 146.

as admitted, they were correct. A wrongful conversion of the oil in question by the defendant, would sustain the action, and if he, or the firm of which he was a member, knowingly took advantage of the mistake of the plaintiffs' agents, and appropriated the property of another to the use of the firm, it would be such a conversion. This is the substance of the charge, and is, so far as it goes, a sound exposition of the law.

*The judgment reversed, and a venire  
facias de novo awarded.*

<sup>1</sup> Morris v. Buchanan, 6 C. & P. 18; Hills v. Snell, 104 Miss. 173; Freeman v. Etter, 21 Minn. 2; Tousley v. Board, 39 Minn. 419 *Accord.* — ED.

## CHAPTER III.

## DEFAMATION.

## SECTION I.

*Publication.*

## HALL v. HENNESLEY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[Reported in *Croke's Elizabeth*, 486.]

**ACTION** for words. Whereas he was robbed by persons unknown of divers parcels of linen cloth; that the defendant *præmissa sciens*, in slander of the plaintiff, spake these words in the presence of divers others, viz.: "Hugh Hall" (*innuendo* the plaintiff) "hath received three pieces of his cloth again of the thief, and beareth with the thief, and if I have any hurt hereafter, I will charge him with it." After verdict for the plaintiff, it was moved in arrest of judgment that this declaration was not good; for it is that he spake those words *in præsentia diversorum*, and doth not say *in auditu*, and if none heard, it is not a slander; and as to it, *non allocatur*. For it shall be necessarily intended that it was *in auditu*, when it was *in præsentia*, &c.<sup>1</sup> But for the words themselves, they all held that they were not actionable.

Wherefore it was adjudged for the defendant.

<sup>1</sup> *Miller v. Johnson*, 79 Ill. 58; *McGowan v. Manifee*, 7 Monr. 314; *Brown v. Brashier*, 2 P. & W. 114; *Burbank v. Horn*, 39 Me. 235 *Accord*. See *Curtis v. Moore*, 15 Wis. 137.

An averment of publication is sufficient without adding "in the presence of others." *Taylor v. How*, Cro. El. 861; *Ware v. Cartledge*, 24 Ala. 622; *Goodrich v. Warner*, 21 Conn. 432; *Burton v. Burton*, 3 Greene, 316; *Watts v. Greenlee*, 2 Dev. 115; *Hurd v. Moore*, 2 Oreg. 85; *Duel v. Agan*, 1 Code Reporter, 134; *Waistel v. Holman*, 2 Hall, 172; *Wilcox v. Moon*, 63 Vt. 481; *Benedict v. Westover*, 44 Wis. 404.

An allegation that defendant printed in a newspaper amounts to a statement of a publication. *Baldwin v. Elphinstone*, 2 Bl. 1037. See *Watts v. Fraser*, 7 A. & E. 223; *Sproul v. Pillsbury*, 72 Me. 20. — Ed.

## CLUTTERBUCK v. CHAFFERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 14, 1816.

[*Reported in 1 Starkie, 471.*]

THIS was an action for the publication of a libel.

The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated on cross-examination that the letter had been delivered to him folded up, but unsealed, and that without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

LORD ELLENBOROUGH held that this did not amount to a publication which would support an action, although it would have sustained an indictment,<sup>1</sup> since a publication to the party himself tends to a breach of the peace. *Verdict for the defendant.*<sup>2</sup>

## SNYDER v. ANDREWS.

SUPREME COURT, NEW YORK, MARCH 5, 1849.

[*Reported in 6 Barbour, 43.*]

THIS was an action on the case for a libel. The defendant pleaded the general issue, and gave notice of special matter.<sup>3</sup>

The cause was tried at the Saratoga circuit in November, 1847, before Justice Paige. On the trial the defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post-office at Saratoga Springs, directed to the plaintiff at his residence. The plaintiff proved by John R. Brown that the letter

<sup>1</sup> Edwards v. Wooton, 12 Rep. 35; Peacock v. Raynel, 2 Brownl. 151; Barrow v. Lewellin, Hob. 62; Hick's Case, Hob. 215; Rex v. Burdett, 4 B. & Ald. 95 *Accord.* — Ed.

<sup>2</sup> Phillips v. Jansen, 2 Esp. 624; Ward v. Smith, 4 C. & P. 305; Warnock v. Mitchell, 43 F. R. 428; Spaits v. Poundstone, 87 Ind. 522; McIntosh v. Matherly, 9 B. Monr. 119; Lyle v. Clason, 1 Caines, 581; Waistel v. Holman, 2 Hall, 172; Prescott v. Tousey, 50 N. Y. Sup'r Ct. 12; Fonville v. McNease, Dudley, 303; State v. Syphrett, 27 S. Ca. 29; Wilcox v. Moon, 63 Vt. 481; Wilcox v. Moon, (1892 Vt.) 24 Atl. R. 244 *Accord.*

See Aherne v. Maguire, A. M. & O. 42.

If two persons combine in sending a libel to the plaintiff, each is guilty of a publication to the other. Spaits v. Poundstone, 87 Ind. 522, 524, 525.

In Virginia, by statute, an action lies for insulting words written or spoken, although not read or heard by a third person. Rolland v. Batchelder, 84 Vt. 664. — Ed.

<sup>3</sup> Part of the case, not relating to publication, is omitted. — Ed.



was read to the witness by the defendant at his office in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion.

The jury found a verdict for the plaintiff of \$250. And the defendant, upon a bill of exceptions, moved for a new trial.

*A. Bokes*, for the plaintiff. *D. Wright*, for the defendant.

WILLARD, J. The fact that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true by the form of the objection; but it is insisted that such reading did not amount to a publication of the libel. No man incurs any civil responsibility by what he thinks or even writes, unless he divulges his thoughts to the temporal prejudice of another. Hence, a sealed letter containing libellous matter, if communicated to no one but to the party libelled, is not the foundation for a civil action, although it may be of an indictment. *Lyle v. Clason*; <sup>1</sup> *Hodges v. The State*; <sup>2</sup> *Phillips v. Jansen*.<sup>3</sup> But where the defendant, knowing that letters addressed to the plaintiff were usually opened by and read by his clerk, wrote a libellous letter and directed it to the plaintiff, and his clerk received and read it, it was held there was a sufficient publication to support the action. *Dela-croix v. Thevenot*. And in *Schenck v. Schenck*,<sup>4</sup> a sealed letter addressed and delivered to the wife containing a libel on her husband was held a publication sufficient to enable the latter to sustain an action.<sup>5</sup> Reading or singing the contents of a libel in the presence of others has been adjudged a publication. 2 Starkie on Slander, 16; 5 Rep. 125; 9 Id. 59 b; 1 Saund. 132, n. 2. The reading of the letter in question by the defendant in the presence of Brown was a sufficient publication to sustain this action. *New trial denied*.<sup>6</sup>

<sup>1</sup> 1 Caines, 581.

<sup>2</sup> 5 Humphrey, 112; 1 Wms. Saund. 132, n. 2.

<sup>3</sup> 2 Esp. 626; 2 Starkie on Slander (Wend. ed.), 14.

<sup>4</sup> 1 Spencer, 208.

<sup>5</sup> *Wenman v. Ash*, 13 C. B. 836; *Jones v. Williams*, 1 Times, L. R. 572; *Sesler v. Montgomery*, 78 Cal. 486, 489 (*semble*); *Wilcox v. Moon*, 61 Vt. 484; *Wilcox v. Moon*, (Vt. 1892) 24 Atl. R. 244 *Accord*.

But a communication by the libeller to his own wife is said not to be a publication. *Wennhak v. Morgan*, 20 Q. B. D. 635; *Sesler v. Montgomery*, 78 Cal. 486; *Trumbull v. Gibbons*, 3 City H. Rec. 97. But see *State v. Shoemaker*, 101 N. Ca. 690. It would be more accurate to say that the communication in such a case is privileged. — Ed.

<sup>6</sup> *M'Coombs v. Tuttle*, 5 Blackf. 431; *Van Cleef v. Lawrence*, 2 City H. Rec. 41, *Accord* — Ed.

## DELACROIX v. THEVENOT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., MARCH 4, 1817.

*[Reported in 2 Starkie, 63.]*

THIS was an action for a libel and slanderous words. The libel was contained in a letter directed to plaintiff.

A clerk of the plaintiff proved that he had received the letter; that it was in the handwriting of the defendant; and that in the absence of the plaintiff he was in the habit of opening letters directed to him which were not marked "private." He further stated that defendant, who was well acquainted with the plaintiff, was aware of the nature of his (the clerk's) employment, and that he believed defendant knew that witness was in the habit of opening plaintiff's letters.

LORD ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether defendant did not intend the letter to come to the hands of a third person, which would be a publication.

*Verdict for plaintiff. Damages, £100.<sup>1</sup>*

## SHEFFILL AND WIFE v. VAN DEUSEN AND WIFE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1859.

*[Reported in 13 Gray, 304.]*

## ACTION of tort for slander.

BIGELOW, J.<sup>2</sup> Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in

<sup>1</sup> *Wyatt v. Gore*, Holt, 299; *Wenman v. Ash*, 13 C. B. 836; *Kiene v. Ruff*, 1 Iowa, 482; *Allen v. Wortham*, 89 Ky. 485; *Schenck v. Schenck*, Spencer, 208; *Wilcox v. Moon*, (Vt. 1892) 24 Atl. R. 244; *Adams v. Lawson*, 17 Gratt. 250 *Accord*.

See *Fox v. Broderick*, 14 Ir. C. L. R. 453; *Callan v. Gaylord*, 3 Watts, 321. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor.<sup>1</sup> *Edwards v. Wooton*; <sup>2</sup> *Hick's Case*; <sup>3</sup> *Wheeler & Appleton's Case*; <sup>4</sup> *Phillips v. Jansen*; <sup>5</sup> *Lyle v. Clason*; <sup>6</sup> *Hammond N. P.* 287.

It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by third persons? The defendants were therefore entitled to the instructions for which they asked.

*Exceptions sustained.*<sup>7</sup>

<sup>1</sup> *Jones v. Davers*, Cro. Eliz. 496; *Price v. Jenkins*, Cro. El. 865; *Amann v. Damm*, 8 C. B. N. S. 597; *Kiene v. Ruff*, 1 Iowa, 42; *Hurtert v. Weines*, 27 Iowa, 134; *Milenz v. Quasdorf*, 68 Iowa, 726; *Wormouth v. Cramer*, 3 Wend. 394 *Accord*.

See *Bechtell v. Shatler*, Wright (Ohio), 107. Conf. *Anon.*, Moore, 182; *Gibbs v. Jenkins*, Hob. 191; *Zenobio v. Axtell*, 6 T. R. 162; *Jenkins v. Phillips*, 9 C. & P. 766; *Hickley v. Grosjean*, 6 Blackf. 351; *Kernholtz v. Becker*, 3 Den. 346; *Rahauser v. Barth*, 3 Watts, 28; *Zeig v. Ort*, 3 Chandl. 26; *K. v. H.*, 20 Wis. 239; *Filber v. Dauterman*, 26 Wis. 518; *Simonson v. Herald Co.*, 61 Wis. 626; *Petzer v. Benisly*, 67 Wis. 291. — ED.

<sup>2</sup> 12 Co. 35.

<sup>3</sup> Pop. 139 and Hob. 215.

<sup>4</sup> Godb. 340.

<sup>5</sup> 2 Esp. 624.

<sup>6</sup> 1 Caines, 581.

<sup>7</sup> *Anon.*, Sty. 70; *Force v. Warren*, 15 C. B. N. S. 808; *Desmond v. Brown*, 33 Iowa, 18; *Marble v. Chapin*, 132 Mass. 225, 226; *Broderick v. James*, 3 Daly, 481 *Accord*. — ED.

## SECTION II.

*Libel.*

## THORLEY v. LORD KERRY.

IN THE EXCHEQUER CHAMBER, MAY 9, 1812.

[Reported in 4 Taunton, 355.]

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. "This was an action for a libel contained in a letter addressed to Lord Kerry, and sent open by one of his servants, who became acquainted with its contents. The libel charged his Lordship with being a hypocrite, and using the cloak of religion for unworthy purposes."<sup>1</sup> Upon not guilty pleaded, the cause was tried at the Surrey spring assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it; a verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

*Barnewall*, for the plaintiff in error.

MANSFIELD, C. J., delivered the opinion of the court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham; that, being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house, that the plaintiff in error was churchwarden, and that the defendant, in error gave him notice of his agreement with Lord Douglas; and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in

<sup>1</sup> This short statement of the case, taken from 3 Camp. 214, has been substituted for the declaration which is set out at considerable length in the original report. — ED.

such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of "bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal; by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to

suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> The distinction sanctioned in the principal case between oral and written scandal still obtains in England and the United States. The definition of a libel as a written publication calculated to bring another into hatred, ridicule, or contempt, is also universally recognized in English-speaking countries. As it is a pure question of fact for the jury whether the publication in a given case comes within this definition, it has not seemed advisable to bring together in this book the multitudinous instances which have been passed upon. A full collection of the cases may be found in Odgers, *Libel and Slander* (2d ed.), 20-24; Townshend, *Slander and Libel* (4th ed.), 203-221; 13 *Am. & Eng. Encyc. of Law*, 299-308. — ED.

## SECTION III.

*Slander.*

(a) WORDS IMPUTING CRIME.

## BROWNE v. HAWKINS.

IN THE KING'S BENCH, TRINITY TERM, 1477.

[Reported in Year Book, 17 Edward IV., folio 3, placitum 2.]

*Townsend.* As to the claim [that the plaintiff was the villein of the defendant] this is only a defamation [*infamy*], as if one calls me a thief, which gives no action in our law. . . .

BILLING, C. J., and NEEDHAM, J. . . . There are divers cases in our law where one shall have *damnum absque injuria*; as for defamation in calling one a thief, or traitor, this is a damage in our law, but no tort.<sup>1</sup>

## ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1535.

[Reported in Year Book, 27 Henry VIII., folio 14, placitum 4.]

AN action on the case was brought because the defendant called the plaintiff a heretic, and one of the new learning.

*Wilby* asked if this action would lie here, since it was a spiritual matter.

FITZHERBERT, C. J., and SHELLEY, J. It is clear that this action does not lie here, for it is merely spiritual. And if the defendant should justify that the plaintiff is a heretic, and should show in what point, we could not discuss whether it was heresy or not. But if it were matter wherein we could decide the main thing, as thief, or traitor, or the like, for such words an action would lie here, since we have cognizance of what is treason or felony.

<sup>1</sup> See also Y. B. 12 Hen. VII. fol. 22, pl. 2. — Ed.

## DAVIS v. MILLER,

IN THE KING'S BENCH, TRINITY TERM, 1741 OR 1742.

[Reported in 2 *Strange*, 1169.]

THESE words, "You cheated the lawyer of his linen, and stood bawd to your daughter, to make it up with him; you cheat everybody; you cheated me of a sheet; you cheated Mr. Saunders, and I will let him know it," — were held not actionable, without a *colloquium* of the plaintiff's trade or profession.<sup>1</sup>

## WEBB v. BEAVAN.

IN THE QUEEN'S BENCH DIVISION, MAY 10, 1883.

[Reported in 11 *Queen's Bench Division*, 609.]

DEMURRER to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The plaintiff claimed £500 damages.

Demurrer, on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

*W. H. Nash*, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely. He referred to *Odgers on Libel and Slander*, p. 54.

*Hammond Chambers*, contra, contended that, according to the earlier authorities, the test, in ascertaining whether words were actionable *per se*, was whether the offence imputed was punishable corporally or by fine, and that it was not necessary to allege that the words imputed

<sup>1</sup> *Anon.*, Dall. 45-35; *Anon.*, Moore, 29; *George's Case*, Cro. Eliz. 95; *Somerstailer v. —*, Gold. 125-12; — *v. Gilbert*, Ow. 47; *Middlemore's Case*, 3 Leon. 17; *Gittings v. Redserve*, Hutt. 13; *Walcot v. Hind*, Hutt. 14; *Ludwell v. Hole*, Stra. 696; *Bellamy v. Barker*, Stra. 304; *Osborn v. Poole*, Ld. Ray. 236; *Welden v. Johnson*, 1 Sid. 48; *Tiverton v. —*, W. Jones, 308; *Killick v. Barnes*, 2 Bulst. 138; *Hopton v. Baker*, 2 Bulst. 228; *Tut v. Kerton*, 1 Bulst. 172 *Accord*.

*Anon.*, Dall., 48-26 *Contra*. — *ED*.



an indictable offence. He cited Com. Dig. tit. Action on the Case for Defamation, D. 5 and 9; *Curtis v. Curtis*.<sup>1</sup>

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offence" seems to have crept into the text-books, but I think the passages in Comyns' Digest are conclusive to show that words which impute any criminal offence are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander. *Demurrer overruled.*<sup>2</sup>

<sup>1</sup> 10 Bing. 477.

<sup>2</sup> There is great diversity of opinion as to what words, imputing the commission of a crime, are actionable *per se*. The authorities may be classified as follows:—

I. Words imputing a criminal offence punishable corporally.

In *Hawes's Case*, March, 113 (Speaking against common prayer); *Heake v. Moulton*, Yelv. 90; *Walden v. Mitchell*, 2 Ventr. 265; *Scoble v. Lee*, 2 Show. 32 (Regrating); *McCabe v. Foot*, 15 L. T. Rep. 115; *Elliott v. Ailsberry*, 2 Bibb, 473 (Fornication); *M'Gee v. Wilson*, Litt. S. C. 187 (Unchastity); *Miles v. Wimp*, 10 B. Mon. 417 (*semble*); *Buck v. Hersey*, 31 Me. 558 (Drunkenness); *Wagaman v. Byers*, 17 Md. 183 (Adultery); *Birch v. Benton*, 26 Mo. 153 (Whipping one's wife); *Speaker v. McKenzie*, 26 Mo. 255 (Whipping one's mother); *Billings v. Wing*, 7 Vt. 439 ("He snaked his mother out of doors by the hair of her head; it was the day before she died"), the words uttered were held not to give a right of action, since they imputed crimes punishable only by fine, or by imprisonment merely as a consequence of the non-payment of the fine.

II. Words imputing a criminal offence and involving moral turpitude. *Frisbie v. Fowler*, 2 Conn. 709; *Hoag v. Hatch*, 23 Conn. 585; *Page v. Merwin*, 54 Conn. 426; *Reitan v. Goebel*, 33 Minn. 151.

III. Words imputing a criminal offence, involving moral turpitude and punishable corporally. *Redway v. Gray*, 31 Vt. (qualifying *Billings v. Wing*, 7 Vt. 439); *Murray v. McAllister*, 38 Vt. 167.

IV. Words imputing a criminal offence involving disgrace. *Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1; *Kenney v. McLaughlin*, 5 Gray, 3; *Ranger v. Goodrich*, 17 Wis. 78; *Mayer v. Schleichter*, 29 Wis. 646; *Gibson v. Gibson*, 43 Wis. 23; *Geary v. Bennett*, 53 Wis. 444.

V. Words imputing a criminal offence subjecting the offender to infamous punishment. *Shipp v. McCraw*, 3 Murph. 463; *Brady v. Wilson*, 4 Hawks. 94; *Skinner v. White*, 1 Dev. & Bat. 471; *Wall v. Hoskins*, 5 Ired. 177; *Wilson v. Tatum*, 3 Jones (N. Ca.), 300; *McKee v. Wilson*, 87 N. Ca. 300; *Harris v. Terry*, 98 N. Ca. 131.

VI. Words imputing an *indictable* offence involving moral turpitude, or subjecting the offender to an infamous punishment. See *Brooker v. Coffin*, *infra*, and cases cited.

VII. Words imputing an *indictable* offence punishable corporally. *Griffin v. Moore*, 43 Md. 246; *Shafer v. Ahalt*, 48 Md. 171; *Birch v. Benton*, 26 Mo. 153; *Curry v. Collins*, 37 Mo. 324; *Bundy v. Hart*, 46 Mo. 460; *Lewis v. McDaniel*, 82 Mo. 577; *Houston v. Woolley*, 37 Mo. Ap. 15, 24. — ED.

## BROOKER v. COFFIN.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1809.

[Reported in 5 Johnson, 188.]

SPENCER, J., delivered the opinion of the court.<sup>1</sup> The first count is for these words, "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages.<sup>2</sup> By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable;<sup>3</sup>

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> By 54 & 55 Vict. c. 51, words which impute unchastity or adultery to any woman or girl are actionable, without special damage.

<sup>3</sup> This rule has been approved in the following cases: Pollard v. Lyon, 91 U. S. 225; Perdue v. Burnett, Minor, 138; Dudley v. Horn, 21 Ala. 379; Hillhouse v. Peck, 2 St. & P. 395; Heath v. Devaughn, 37 Ala. 677; Kinney v. Hosea, 3 Harring. 77; Pledger v. Hathcock, 1 Ga. 550; Giddens v. Mink, 4 Ga. 364; Richardson v. Roberts, 23 Ga. 215; Burton v. Burton, 3 Greene, 316; Halley v. Gregg, 74 Iowa, 563; St. Martin v. Desnoyer, 1 Minn. 156; West v. Hanrahan, 28 Minn. 385; Chaplin v. Lee, 18 Neb. 440; Hendrickson v. Sullivan, 28 Neb. 329; McCuen v. Ludlum, 2 Harr. 12; Johnson v. Shields, 25 N. J. 116; Widrig v. Oyer, 13 Johns. 124; Martin v. Stilwell, 13 Johns. 275; Alexander v. Alexander, 9 Wend. 141; Case v. Buckley, 15 Wend. 327; Bissell v. Cornell, 24 Wend. 354; Demarest v. Haring, 6 Cow. 76; Young v. Miller, 3 Hill, 21; Wright v. Paige, 3 Keyes, 581, 3 Trans. Ap. 134 s. c.; Crawford v. Wilson, 4 Barb. 504; Johnson v. Brown 57 Barb. 118; Quinn v. O'Gara, 2 E. D. Sm. 388; Dial v. Holter, 6 Oh. St. 228; Alfele v. Wright, 17 Oh. St. 238; Hollingsworth v. Shaw, 19 Oh. St. 430; Davis v. Brown, 27 Oh. St. 326; Davis v. Sladden, 17 Oreg. 259; Andres v. Koppenheaver, 3 S. & R. 255; Davis v. Carey, 141 Pa. 314; Gage v. Shelton, 3 Rich. 242; Smith v. Smith, 2 Sneed, 473; McAnally v. Williams, 3 Sneed, 26; Poe v. Grever, 3 Sneed, 664. — ED.

and Baron Comyns considers the test to be, whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F, 20. There is not, perhaps, so much uncertainty in the law upon any subject as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

*The defendant must, therefore, have judgment.*

### FOWLER v. DOWDNEY.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., MARCH 2, 1838.

[Reported in 2 Moody & Robinson, 119.]

SLANDER, for saying of the plaintiff, "He is a returned convict."

*Erle* contended that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment.

LORD DENMAN, C. J. My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported. That is, I think, the plain meaning of the words as set out in the declaration; they import, to be sure, that the punishment has been suffered, but still the obloquy remains.<sup>1</sup>

*Verdict for the plaintiff. Damages, 1s.*

### HANKINSON v. BILBY.

IN THE EXCHEQUER, JANUARY 28, 1847.

[Reported in 16 Meeson & Welsby, 442.]

CASE. The declaration stated that the defendant, in the presence and hearing of divers subjects, falsely and maliciously charged the plaintiff,

<sup>1</sup> Gainford v. Tuke, Cro. Jac. 536; Boston v. Tatam, Cro. Jac. 623; Beavor v. Hides, 2 Wils. 300; Stewart v. Howe, 17 Ill. 71; Wiley v. Campbell, 5 Monr. 396; Krebs v. Oliver, 12 Gray, 239; Johnson v. Dicken, 25 Mo. 580; Van Ankin v. Westfall, 14 Johns. 233; Ship v. McCraw, 3 Murphy, 463; Smith v. Stewart, 5 Pa. 372; Beck v. Stitzel, 21 Pa. 524; Poe v. Grever, 3 Sneed (Tenn.), 664 Accord.

Compare Carpenter v. Tarrant, C. t. Hardw. 339; French v. Creath, Breese, 12; Barclay v. Thompson, 2 P. & W. 148. — ED.

a gardener, with being a thief. Plea: Not guilty. At the trial, before Rolfe, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the Kingsland turnpike-gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the by-standers would understand that charge to be conveyed by them. Verdict for the plaintiff for £5.

*Humfrey* now moved for a new trial, on the ground of misdirection.<sup>1</sup>

ALDERSON, B. In this case, had there been no by-standers who could understand the words as imputing felony, or who knew all about the affair respecting which they were uttered, the judge's direction would have been wrong, for it would then be *damnum absque injuria*, the *injuria* being the having no lawful occasion to impute felony.

PARKE, B. The witness appears to have been well acquainted with the affair to which the words related. If the by-standers were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if by-standers may fairly understand them in a sense and manner injurious to the party to whom they relate, *e. g.* that he was a felon.

Some doubt being suggested as to the facts proved, the court conferred with Rolfe, B.; and the next day,

POLLOCK, C. B., said, We find from my Brother Rolfe that there were several by-standers who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.

*Rule refused.*<sup>2</sup>

<sup>1</sup> The case has been much abridged. — ED.

<sup>2</sup> *Phillips v. Barber*, 7 Wend. 439 *Accord*.

A lunatic is liable for torts generally, *supra*, 56, and also for a libel, *Mordaunt v. Mordaunt*, 39 L. J. Pr. & M. 57, 59. But it is another illustration of the rule of the principal case that defamatory words spoken by a lunatic whose insanity was obvious or known to all the hearers, are not actionable. *Yeates v. Reed*, 4 Blackf. 463; *Dickinson v. Barber*, 9 Mass. 225, 227; *Bryant v. Jackson*, 6 Humph. 199. So also of words spoken and understood as a jest. *Donoghue v. Hayes*, Hayes, 265. Drunkenness is no defence. *Kendrick v. Hopkins Cary*, 133; *Gates v. Meredith*, 7 Ind. 440.

The old rule of construing defamatory statements in *mitiori sensu* was long ago exploded. See *Odgers*, Lib. & Sl. (2d ed.), 93-97. — ED.

SECTION III. (*continued.*)

## (b) WORDS DISPARAGING A PERSON IN HIS TRADE, BUSINESS, OFFICE, OR PROFESSION.

## LUMBY v. ALLDAY.

IN THE EXCHEQUER, HILARY TERM, 1831.

[Reported in 1 *Crompton & Jervis*, 301.]

## ACTION for words.

The judgment of the court was now delivered by

BAYLEY, B.<sup>1</sup> This case came before the court upon a rule *nisi* to enter a nonsuit. The ground of motion was that the words (in slander) proved upon the trial were not actionable.

Two points were discussed upon the motion: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas Light Company, and had behaved himself as such with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration, viz.: "You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores. I will have you in the 'Argus.' You have bought up all the copies of the 'Argus,' knowing you have been exposed. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold."

The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not, from their tenor, import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*,<sup>2</sup> "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage." The

<sup>1</sup> Only the opinion of the court is given. — Ed.

<sup>2</sup> 3 Wils. 177.

same case occurs in Sir Wm. Bl. Rep. 753, and there the rule is expressed to be, "if the words be of probable ill consequence to a person in a trade or profession, or an office."<sup>1</sup>

The objection to the rule, as expressed in both reports, appears to me to be, that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to "having a natural tendency to," and are confined within the limits, I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk. I say as at present advised, for the reason which I am about to state.

The next question is, whether this is properly a ground of nonsuit; and I am of opinion that, under the circumstances of this case, it is not. The words proved are nearly all the words which the first count contains; and if the words proved are not actionable, none of the other words contained in that count are. When the general issue is pleaded to a count, it puts in issue to be tried by the jury the question, whether the facts stated in that count exist. The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration is, before trial, to demur; after trial, to move in arrest of judgment. The duty of the judge, under whose direction the jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the jury in matters of law, which may arise upon the trial of those facts.

As the defendant, therefore, in this case puts in issue the allegations in the declaration, and those allegations were proved upon the trial, we are of opinion that the rule for a nonsuit ought to be discharged; and, notwithstanding the lapse of time, that there ought to be a rule *nisi* to arrest the judgment, if the defendant be advised to take such rule.

*Rule discharged.*<sup>2</sup>

<sup>1</sup> "We think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings." — *Per* CHANNELL, B., in *Foulger v. Newcomb*, L. R. 2 Ex. 327, 330. — ED.

<sup>2</sup> *Alexander v. Angle*, 1 Cr. & J. 143; *Sibley v. Tomlins*, 4 Tyrwh. 90; *Doyley v. Roberts*, 3 B. N. C. 835; *Brayne v. Cooper*, 5 M. & W. 249; *James v. Brook*, 9 Q. B. 7; *Hogg v. Dorrah*, 2 Porter (Ala.), 212; *Oram v. Franklin*, 5 Blackf. 42; *Buck v.*

## AYRE v. CRAVEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1834.

[Reported in 2 *Adolphus & Ellis*, 2.]

ACTION for slander. The declaration alleged that the defendant in the hearing of divers persons uttered words (setting them forth) which imputed adultery to the plaintiff, a medical man.<sup>1</sup> On the trial, before Taunton, J., at the York spring assizes, in this year, a verdict was found for the plaintiff.

In Easter term last, *Alexander*<sup>2</sup> obtained a rule calling on the plaintiff to show cause why the judgment should not be arrested. In Trinity term last (June 10th),

*F. Pollock*, *Wightman*, and *Raines*, showed cause.

*Cur. adv. vult.*

LORD DENMAN, C. J., in this term (Nov. 24th), delivered the judgment of the court.

There are obvious and very good reasons for the jealousy with which the courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed; but here the plaintiff states the grievance as affecting him in his business, office, or profession, without charging that any actual damage has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail to excite surprise: a clergyman having failed to obtain redress for the imputation of adultery;<sup>2</sup> and a school-mistress having been declared incompetent to maintain an action for a charge of prostitution.<sup>3</sup> Such words were undeniably calculated to injure the success of the plaintiffs in their several professions, but, not being applicable to their conduct therein, no action lay.

The doctrine to be deduced from the older cases was recently laid down, after a full discussion, by Mr. Baron Bayley, in *Lumby v. All-day*: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

In that case, accordingly, where a verdict had been recovered by the clerk of a gas company, on a declaration alleging that the defendant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him,

*Hersey*, 31 Me. 558; *Oakley v. Farrington*, 1 Johns. Cas. 129; *Van Tassel v. Capron*, 1 Den. 250; *Ireland v. McGarvish*, 1 Sandf. 155 *Accord.*

Compare *Ware v. Clowney*, 24 Ala. 707; *Butler v. Howes*, 7 Cal. 87; *Fowles v. Bowen*, 30 N. Y. 20. — Ed.

<sup>1</sup> The statement is abridged, and the arguments are omitted. — Ed.

<sup>2</sup> *Parrat v. Carpenter*, Noy, 64; *Cro. El.* 502 s. c.

<sup>3</sup> *Per Twisden, J.*, in *Wharton v. Brook*, 1 Vent. 21.

“You are unfit to hold your situation,” and then imputed incontinence as the reason of his unfitness, the Court of Exchequer thought the judgment ought to be arrested.

In the present case, much doubt was entertained whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested. *Rule absolute.*<sup>1</sup>

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### GALLWEY v. MARSHALL.

IN THE EXCHEQUER, DECEMBER 8, 1853.

[*Reported in 9 Exchequer Reports, 294.*]

THE declaration stated that the defendant in conversation imputed incontinency to the plaintiff, who was in holy orders as a clergyman of the Church of England.

Demurrer and joinder therein.

The judgment of the court was now delivered by

POLLOCK, C. B. (After stating the pleadings, his Lordship proceeded :) We should have had no doubt in the present case of the plaintiff's right to recover, if the declaration had averred that the plaintiff was beneficed, or was in the actual receipt of professional temporal emolument, as a preacher, lecturer, or the like, at the time of the speaking of the words, as the charge, if true, would have been a cause of deprivation of the benefice in the first case, and also of degradation from orders, and consequently of the loss of the emoluments in the other cases. This point was decided in *Dr. Sibthorpe's Case*,<sup>2</sup> *Dod v. Robinson*,<sup>3</sup> in effect overruling the case relied upon for the defendant, *Parrat v. Carpenter*;<sup>4</sup> in which case the court held that the slander was examinable in the spiritual court only; and the reason assigned in *Dod v. Robinson* is, that the matter charged is good cause to have him degraded, whereby he should lose his freehold, which is a temporal damage to him. And the reason given in 1 Roll. Abr. is

<sup>1</sup> See *Morasse v. Brooks*, 151 Mass. 567, 576. — Ed.

<sup>2</sup> *W. Jones*, 366.

<sup>3</sup> 11 Al. 63; 11 Sty. 49 s. c.

<sup>4</sup> Cro. El. 502.



that he could have temporal damage by the speaking of slander. To the same effect is the *dictum* of Lord Holt, as to an imputation of a want of learning being actionable, in *Coxeter v. Parsons*.<sup>1</sup> In the case of *Dod v. Robinson*,<sup>2</sup> the words imputed to the plaintiff not only incontinence, but preaching false doctrine, both of which were causes of degradation, and consequently of deprivation; and the latter charge implied misconduct in his office. But we think it clear that the charge of incontinence made against a beneficed clergyman, and alleged to have been committed whilst he is beneficed, is of that nature that necessarily tends to do him injury in his professional character, and to endanger him in the enjoyment of his office of parson, and is therefore actionable.<sup>3</sup> In this respect, the charge differs from that which was the subject of the second count in the case of *Pemberton v. Colls*.<sup>4</sup>

But in the absence of any averment of the plaintiff having any office or employment of temporal profit, we are not satisfied that this action will lie. There is no authority to be found that we are aware of, in support of the position that it will, where there is no actual damage; and we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. The words are actionable in the spiritual court, as they import incontinency, and incontinency may be punished there, and there only; and if the plaintiff be in orders merely, and not being injured in respect of temporal profit, the only remedy appears to be in the ecclesiastical court.

If incontinence was a crime punishable by temporal punishments, the words spoken might fall within the ordinary rule, that words are actionable which charge an offence liable to temporal punishment. But the statute 1 Hen. VII. c. 4, gives jurisdiction to punish incontinence in ecclesiastics to the archbishop, bishops, and ordinaries only. The Clergy Discipline Act, 3 & 4 Vict. c. 86, does not make such an offence punishable by temporal punishment. Both of these statutes are for giving additional power to ecclesiastical tribunals only.

We therefore think that we ought to hold that the action will not lie.

PLATT, B., added. I must own that during the argument I entertained considerable doubt on the subject. Incontinency is a sufficient ground for deprivation *a beneficio* or *ab officio*, the latter being applicable to the case of an incontinent clerk in orders merely, and without a benefice. It therefore seemed to me, that if the offence imputed was, if true, a sufficient ground for depriving the clergyman of his status as

<sup>1</sup> 1 Ld. Ray. 423, 1 Salk. 692.

<sup>2</sup> Al. 63, Sty. 49.

<sup>3</sup> *Bishop of Norwich v. Prickett*, Cro. Eliz. 1 (Heterodoxy in religion); *Payne v. Beumorris*, 1 Lev. 248 (Incontinence); *Pope v. Ramsey*, 1 Keb. 542 (Knave, &c.); *Chaddock v. Briggs*, 13 Mass. 247 (Drunkenness); *Demarest v. Haring*, 6 Cow. 76 (Incontinence); *Hayner v. Cowden*, 27 Oh. St. 292 (Drunkenness); *McMillan v. Birch*, 1 Binney, 178 (Drunkenness); *Starr v. Gardner*, 6 Up. Can. Q. B. O. S. 512 (Incontinence); but see, *contra*, *Breeze v. Sails*, 23 Up. Can. Q. B. 94 (Incontinence) *Accord*.

*Parrat v. Carpenter*, Cro. El. 502; *Nicholson v. Lyne*, Cro. El. 94; *Anon.*, Sty. 49 *Contra*. — Ed.

<sup>4</sup> 10 Q. B. 461.

such, the slander would be actionable *per se*, inasmuch as the degradation from his order would be a temporal damage. If the slander had been of a barrister, imputing to him such misconduct as would justify his being disbarred, it might be a good cause of action against the slanderer, although the slandered person never held a brief, or his profits were merely honorary. Other instances may be readily suggested; but I do not feel so strong upon the point as to induce me to differ from the other members of the court.

*Judgment for the defendant*

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JONES v. LITTLER.

IN THE EXCHEQUER, JANUARY 16, 1841.

[*Reported in 7 Meeson & Welsby, 423.*]

SLANDER. The declaration stated that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer the false, scandalous, malicious, and defamatory words following: "I'll" (meaning that he, the defendant, would) "bet £5 to £1, that Mr. Jones" (meaning the plaintiff) "was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Whereupon the said Henry Pye then asked the defendant, "Do you mean to say that Mr. Jones, brewer, of Rose Hill" (meaning and describing the plaintiff), "has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The jury having returned a verdict for the plaintiff, the court granted a rule to show cause why there should not be a new trial, on a suggestion that the learned judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not.

PARKE, B. It is quite clear that this rule ought to be discharged, for the only ground on which it was granted has failed, inasmuch as the learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact that in the conversation in question the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith*<sup>1</sup> is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were

<sup>1</sup> 2 Ld. Raym. 1480.

all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre v. Craven* and *Doyle v. Roberts*.<sup>1</sup> In the latter of those cases the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of "insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *Doyle v. Roberts*.

ALDERSON and ROLFE, BB., concurred.

*Rule discharged.*<sup>2</sup>

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## SECOR v. HARRIS.

SUPREME COURT, NEW YORK, SEPTEMBER, 1854.

[Reported in 18 Barbour, 425.]

MOTION by the plaintiff for a new trial, upon a bill of exceptions.

*F. U. Fenno*, for the plaintiff. *W. B. Hawes*, for the defendant.

MASON, J. This is an action for slander. Upon the trial of the cause the plaintiff proved the following words, which were also alleged in the complaint: "Doctor Secor killed my children." "He gave them teaspoonful doses of calomel, and they died." "Dr. Secor gave them teaspoonful doses of calomel, and it killed them; they did not live long after they took it. They died right off,—the same day." The plaintiff was proved to be a practising physician, and the evidence shows that he had practised in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and

<sup>1</sup> 3 Bing. N. Ca. 835.

<sup>2</sup> *Kempe's Case*, Dy. 72, pl. 6, Ames, Cas. Torts (1st ed.), 706 and n. 1; *Stanton v. Smith*, 2 Ld. Ray. 1480; *Brown v. Smith*, 13 C. B. 596; *Davis v. Ruff*, Cheeves, 17 Accord.

*Barnes v. Trundy*, 31 Me. 321; *Redway v. Gray*, 31 Vt. 292 *Contra*.

See *Bell v. Thatcher*, Freem. 276; *Bryant v. Loxton*, 11 Moo. 344; *Taylor v. Church*, 1 E. D. Smith, 287; *Fowles v. Bowen*, 30 N. Y. 20. — Ed.

took them from the consideration of the jury. These words, spoken of the plaintiff as a physician, are actionable *per se*, whatever may be said upon the question, whether they impute a criminal offence. They do not impute a criminal offence, unless there is evidence, arising from the quantity of the calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of such tender years full teaspoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children, in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question, whether the defendant did not intend to impute to the plaintiff, by these words, a criminal offence. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them teaspoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine, as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. Starkie on Slander, 100, 110, 115, 10, 12; Martyn v. Burlings;<sup>1</sup> Bacon's Abr. title Slander, B; Watson v. Van Derlash;<sup>2</sup> Tutler v. Alwin;<sup>3</sup> Smith v. Taylor;<sup>4</sup> Sumner v. Utley.<sup>5</sup> I am aware that it was held, in the case of Poe v. Mondford,<sup>6</sup> that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in Foot v. Brown,<sup>7</sup> that it was not actionable to say of an attorney or counsellor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of Poe v. Mondford is repudiated in Bacon's Abr. as authority, and cases are referred to as holding a contrary doctrine (vol. ix. pages 49, 50). The cases of Poe v. Mondford, and of Foot v. Brown, were reviewed by the Supreme Court of Connecticut, in the case of Sumner v. Utley,<sup>8</sup> with most distinguished

<sup>1</sup> Cro. Eliz. 589.<sup>2</sup> Hetl. 69.<sup>3</sup> 11 Mod. R. 221.<sup>4</sup> 1 New R. 196.<sup>5</sup> 7 Conn. R. 257.<sup>6</sup> Cro. El. 620.<sup>7</sup> 8 Johns. 64.<sup>8</sup> 7 Conn. R. 257.

ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held, that words are actionable in themselves, which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskilfulness. To the same effect is the case of *Johnson v. Robertson*,<sup>1</sup> where it was held that the following words spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutler v. Alwin*,<sup>2</sup> where it was held to be actionable to say of an apothecary, that "he killed a patient with physic." See also 3 *Wilson's R.* 186; *Bacon's Abr.* title Slander, letter B, 2, vol. ix. page 49 (*Bouv. ed.*). The cases of *Poe v. Mondford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American States, while the case of *Poe v. Mondford* seems to have been repudiated in England; and I agree with *Clinch, J.*, that the reason upon which that case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskilfulness; and where charges are made against a physician that fall within this class of cases, they are not actionable, without proof of special damages.<sup>3</sup> 7 *Conn. R.* 257. It is equally true, that a single act of a physician may evince gross ignorance, and such a total want of skill, as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable *per se*. 7 *Conn. R.* 257. The rule may be laid down as a general one that, when the charge implies gross ignorance and unskilfulness in his profession, the words are actionable *per se*. This is upon the ground that the law presumes damage to result, from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. *Starkie on Slander*, 581. It was well said by the learned Chief Justice *Hosmer*, in *Sumner v. Utley*,<sup>4</sup> that, "As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By con-

<sup>1</sup> 8 *Porter's R.* 486.

<sup>2</sup> 11 *Mod. R.* 221.

<sup>3</sup> *Sumner v. Utley*, 7 *Conn.* 257; *Garr v. Selden*, 6 *Barb.* 416; *Rodgers v. Kline*, 56 *Miss.* 808; *Lynde v. Johnson*, 39 *Hun.* 5. *Accord.* — *Ed.*

<sup>4</sup> 7 *Conn.* 257.

fining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then, the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence; and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies; and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof: Starkie on Slander, 581; in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practise." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the consideration of the jury, and a new trial must be granted; costs to abide the event of the action.

CRIPPEN, J., concurred. SHANKLAND, J., dissented.

*New trial granted.*<sup>1</sup>

<sup>1</sup> Johnson v. Robertson, 8 Port. (Ala.) 486; Sumner v. Utley, 7 Conn. 257; Lynde v. Johnson, 39 Hun, 12; Gauvreau v. Superior Co., 62 Wis. 403 Accord. See Watson v. Vanderlash, Hetl. 71; Edsall v. Russell, 4 M. & Gr. 1090.

Foot v. Brown, 8 Johns. 64 Contra. See Camp v. Martin, 23 Conn. 89; Pratt v. Pioneer Co., 35 Minn. 251. — Ed.

SECTION III. (*continued.*)

(c) WORDS IMPUTING A LOATHSOME DISEASE.

TAYLOR v. PERKINS.

IN THE KING'S BENCH, HILARY TERM, 1607.

[*Reported in Croke, James, 144.*]

ACTION for these words: "Thou art a leprous knave." It was demurred upon the declaration, because the defendant conceived an action lay not for these words. But upon the first motion all the court held, that the action well lay, for they are as well actionable as if he had said, "Thou wast laid of the pox." Wherefore, without argument, it was adjudged for the plaintiff.

SMITH v. HOBSON.

IN THE KING'S BENCH, TRINITY TERM, 1647.

[*Reported in Style, 112.*]

SMITH, an innkeeper in Warwick, brought an action upon the case against Hobson for speaking these words: "Colonel Egerton had the French pox, and hath set it in the house" (meaning the plaintiff's house), "and William Smith and his wife" (meaning the plaintiff and his wife) "have it, and all you." The plaintiff hath a verdict. The defendant moves in arrest of judgment, and for cause shows, that the words are not actionable; for the words are, that Colonel Egerton hath set the French pox in the house, which is impossible; for the house could not have the pox, and the words, "William Smith and his wife have it," shall not be meant that they have the pox, but the house, for that is the next antecedent to the words, to which they shall refer. ROLL, J., held the words here actionable, and bid the plaintiff take his judgment, if cause were not shown to the contrary Saturday following. Judgment was afterwards given accordingly.<sup>1</sup>

<sup>1</sup> Brook v. Wife, Cro. El. 214; Davies v. Taylor, Cro. El. 648; Garford v. Clerk. Cro. El. 857; Miller's Case, Cro. Jac. 430; Crittal v. Horner, Hob. 219; Elyott v. Blagen, Sty. 283; Marshall v. Chickall, 1 Sid. 50; Comming's Case, 2 Sid. 5; Lymbe v. Hockley, 1 Lev. 205; Grimes v. Lovel, T. Ray. 446; Clifton v. Wells, T. Ray. 710; Whitfield v. Powel, 12 Mod. 248; Bloodworth v. Gray, 7 M. & G. 334; Watson v. McCarthy, 2 Ga. 57; Nichols v. Guy, 2 Ind. 82; Golderman v. Stearns, 7 Gray, 181; Williams v. Holdredge, 22 Barb. 396; Hewit v. Mason, 24 How. Pr. 366; Kaucher v. Blinn, 29 Oh. St. 62; Irons v. Field, 9 R. I. 216 *Accord.*

Bury v. Chappel, Golds. 135; James v. Rutlech, 4 Rep. 17 a; Hunt v. Jones, Cro. Jac. 499; Califord v. Knight, Cro. Jac. 514 *Contra.* — ED.

## TAYLOR v. HALL.

IN THE KING'S BENCH, TRINITY TERM, 1743.

[Reported in 2 *Strange*, 1189.]

THE COURT held that it was not actionable to say the plaintiff had had the pox. For it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, those inconveniences will not attend him. And judgment was arrested.<sup>1</sup>

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## O "GEORGE, THE COUNT JOANNES," v. BURT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1863.

[Reported in 6 *Allen*, 336.]

HOAR, J.<sup>2</sup> The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. The *King v. Harvey*,<sup>3</sup> *Southwick v. Stevens*.<sup>4</sup> An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders.

In addition to this vital objection in matter of substance, the declaration fails to set forth the supposed cause of action in substantial conformity with the requirements of the statute; and contains many superfluous allegations, which are manifestly irrelevant, impertinent, and scandalous.

*Appeal dismissed.*

<sup>1</sup> *Smith's Case*, Noy, 157; *Dutton v. Eaton*, Al. 31; *Carslake v. Mapledoram*, 2 T. R. 473; *Nichols v. Guy*, 2 Ind. 82; *Pike v. Van Wormer*, 5 How. Pr. 171; *Irons v. Field*, 9 R. I. 216 *Accord*.

*Austin v. White*, Cro. El. 214; *Anon. Ow.* 34; *Hobson v. Hudson*, Sty. 199, 219 *Contra*. — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

<sup>3</sup> 2 B. & C. 257.

<sup>4</sup> 10 Johns. 443.



SECTION III. (*continued*.)

(d) DEFAMATORY WORDS NOT ACTIONABLE PER SE, BUT CAUSING SPECIAL DAMAGE.

DAVIES *v.* GARDINER.

IN THE COMMON PLEAS, TRINITY TERM, 1593.

[*Reported in Popham, 36.*<sup>1</sup>]

AN ACTION upon the case for a slander was brought by Anne Davies against John Gardiner; That whereas there was a communication of a marriage to be had between the plaintiff and one Anthony Elcock, the defendant, to the intent to hinder the said marriage, said and published that there was a grocer in London that did get her with child, and that she had the child by the said grocer, whereby she lost her marriage. To which the defendant pleaded not guilty, and was found guilty at the assizes at Aylesbury, to the damage of 200 marks. And now it was alleged, in arrest of judgment, that this matter appeareth to be merely spiritual; and therefore not determinable at common law, but to be prosecuted in the spiritual court. But *per Curiam* the action lies here, for a woman not married cannot by intendment have so great advancement as by her marriage, whereby she is sure of maintenance for her life, or during her marriage, and dower and other benefits which the temporal law gives by reason of her marriage; and therefore by this slander she is greatly prejudiced in that which is to be her temporal advancement, for which it is reason to give her remedy by way of action at common law. As if a woman keep a victualling house, to which divers of great credit repair, whereby she hath her livelihood, and one will say to her guests, that as they respect their credits, they take care how they use such a house, for there the woman is known to be a bawd, whereby the guests avoid her house, to the loss of her husband, shall not she in this case have an action at common law for such a slander? It is clear that she will. So, if one saith that a woman is a common strumpet, and that it is a slander to them to come to her house, whereby she loseth the advantage which she was wont to have by her guests, she shall have her action for this at common law.

So here upon these collateral circumstances, whereby it may appear that she hath more prejudice than can be by calling of one harlot, and the like.

*And judgment was given for the plaintiff.*<sup>2</sup>

<sup>1</sup> 4 Rep. 16 b, s. c. — Ed.

<sup>2</sup> Dame Morrison's Case, Jenk. 316; Matthew *v.* Crasse, 2 Bulst. 89; Sell *v.* Facy, 2 Bulst. 276; s. c. 3 Bulst. 48; Nelson *v.* French, Cro. Jac. 422; Tomson's Case, Bendl. 148; Countess of Salop's Case, Bendl. 155; Taylor *v.* Tolwin, Latch, 218; Wicks *v.* Shepherd, Cro. Car. 155; Southold *v.* Daunston, Cro. Car. 269 *Accord*.

See Bridge *v.* Taylor, Litt. 193; Norman *v.* Simons, 1 Vin. Abr. Act. Words, D, a, 12. — Ed.

## WILLIAM ALLSOP AND WIFE v. THOMAS ALLSOP.

IN THE EXCHEQUER, APRIL 25, 1860.

[Reported in 5 Hurlstone &amp; Norman, 534.]

DECLARATION. — That, before the committing of the grievances, the said Hannah was the wife of the plaintiff, William Allsop; and the defendant, on divers occasions, falsely and maliciously spoke and published of the plaintiff Hannah the words following (to the effect that he had had carnal connection with her whilst she was the wife of the plaintiff, William Allsop): “Whereby the plaintiff Hannah lost the society of her friends and neighbors, and they refused to, and did not, associate with her as they otherwise would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace; and, by reason of the committing of the grievances, the said Hannah became and was ill and unwell for a long time and unable to attend to her necessary affairs and business, and the plaintiff, William Allsop, was put to and incurred much expense in and about the endeavoring to cure her of the illness which she labored under as aforesaid by reason of the committing of the said grievances; and the said William Allsop lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had.”

Demurrer and joinder.

Quain, in support of the demurrer.<sup>1</sup>

Prentice, contra.

POLLOCK, C. B. We are all of opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford v. Monroe*<sup>2</sup> is the only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or, in fact, any that do not fairly and naturally result from the wrongful act itself. It is only lately that a clear and distinct view of the subject of damages was taken, in *Hadley v. Baxendale*,<sup>3</sup> in which it

<sup>1</sup> The arguments of counsel are omitted, together with the concurring opinions of MARTIN, BRAMWELL, and WILDE, BB. — Ed.

<sup>2</sup> 20 Wendell, 210.

<sup>3</sup> 9 Exch. 341.

was held that a person whose duty it is to deliver goods to another is not responsible for any damages resulting from the non-delivery, unless they are the damages which would result immediately and naturally, that is, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made contract. Slander may be repeated, and the repetition may cause mischief. In one sense nothing is more natural than that such should be the case. So there are many other consequences which may follow in libel and slander in respect of which there is no remedy. This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action.

*Judgment for the defendant.*<sup>1</sup>

## DAVIES AND WIFE v. SOLOMON.

IN THE QUEEN'S BENCH, NOVEMBER 29, 1871.

[Reported in *Law Reports*, 9 *Queen's Bench*, 112.]

BLACKBURN, J.<sup>2</sup> The sole difficulty in deciding the case is caused by the opinion of Lord Wensleydale in *Lynch v. Knight*.<sup>3</sup> He held that no action would lie for slander of a wife when the only special damage alleged was the loss to the plaintiff of the consortium of her husband. In the present case, however, it is unnecessary to decide this question, for the declaration, after alleging the loss of cohabitation

<sup>1</sup> *Guy v. Gregory*, 9 C. & P. 584; *Adams v. Smith*, 58 Ill. 421; *Woodbury v. Thompson*, 3 N. H. 194; *Beach v. Ranney*, 2 Hill, 309; *Terwilliger v. Wands*, 17 N. Y. 54 (overruling *Bradt v. Towsley*, 13 Wend. 253; *Olmsted v. Brown*, 12 Barb. 657; *Fuller v. Fenner*, 16 Barb. 333); *Wilson v. Goit*, 17 N. Y. 54; *Bassell v. Elmore*, 48 N. Y. 561 *Accord*.

*McQueen v. Fulgham*, 27 Tex. 463; *Underhill v. Welton*, 32 Vt. 40 *Contra*.

DAMAGES TOO REMOTE. — Damage caused by another person's repetition of the defendant's words is too remote. *Holwood v. Hopkins*, Cro. El. 787; *Ward v. Weeks*, 7 Bing. 211 (but see *Riding v. Smith*, 1 Ex. D. 94); *Rutherford v. Evans*, 4 C. & P. 74; *Tunnichiff v. Moss*, 3 C. & K. 83; *Kendillon v. Maltby*, 1 Car. & M. 402; *Parkins v. Scott*, 1 H. & C. 153; *Dixon v. Smith*, 5 H. & N. 450; *Clark v. Morgan*, 38 L. T. Rep. 354; *Bree v. Marescaux*, 7 Q. B. Div. 434; *Cates v. Kellogg*, 9 Ind. 506; *Stevens v. Hartwell*, 11 Met. 542; *Hastings v. Stetson*, 126 Mass. 329; *Hastings v. Palmer*, 20 Wend. 225; *Hallock v. Miller*, 2 Barb. 630; *Olmsted v. Brown*, 12 Barb. 657; *Terwilliger v. Wands*, 17 N. Y. 58; *Fowles v. Bowen*, 30 N. Y. 20; *Bassell v. Elmore*, 48 N. Y. 561 (but see *Sewell v. Catlin*, 3 Wend. 295; *Kernholtz v. Becker*, 3 Den. 346).

But the rule is otherwise where the repetition is made as a privileged communication. *Gillett v. Bullivant*, 7 Law Times, 490; *Derry v. Handley*, 16 L. T. Rep. 263; *Fowles v. Bowen*, 30 N. Y. 22. — Ed.

<sup>2</sup> Only the opinion of the court is given. — Ed.

<sup>3</sup> 9 H. L. C. 577.

by the wife, proceeds to aver that "she lost, and was deprived of the companionship, and ceased to receive the hospitality of divers friends." Now, first, was that consequence such as might reasonably and naturally be expected to follow from the speaking of the slanderous words? Judging from the habits and manners of society, of all the consequences that might be expected to result from a statement that a woman had committed adultery, or had been guilty of unchastity, the most natural would be that those who had invited her and given her hospitality would thenceforth cease to do so. Then *Moore v. Meagher*<sup>1</sup> decides that the loss of the hospitality of friends is sufficient special damage to sustain an action like the present, and the hospitality, as the word is there used, means simply that persons receive another into their houses, and give him meat and drink gratis. Perhaps such a definition may rather extend the signification of the word, but it is true in effect — for if they do not receive him, or if they make him pay for his entertainment, that is not hospitality. In *Roberts v. Roberts*,<sup>2</sup> it is to be observed, that the loss suffered by the plaintiff in being excluded from a religious society, was not temporal, and was therefore held not to be enough. But in the present case there is a matter of temporal damage — small though it be — laid in the declaration. It is also argued, that inasmuch as this action is brought by the wife, the husband being merely joined for conformity, the damage necessary to give a right to recover must be damage to her alone, and that the loss of hospitality which she has hitherto enjoyed, is only pecuniary loss to her husband, and not to her. That certainly is a plausible argument, as the husband is of course bound to maintain his wife and to supply her with food, although her friends cease to do so. I am, however, unwilling to agree with such artificial reasoning, and I think that the real damage in this case is to the wife herself. Notwithstanding that it is the husband's duty to support his wife, he is only bound to provide her with necessities suitable to his station in life; and she might, by visiting friends in a higher position than himself, enjoy luxuries which he either could not or might not choose to afford her. But I should be sorry to say that we must enter into a nice inquiry as to whether such hospitality would save the purse of the husband or of the wife. I am therefore of opinion that the declaration is good; and the demurrer must be overruled.

MELLOR and HANNEN, JJ., concurred.

*Judgment for the plaintiffs.*

<sup>1</sup> 1 Taunt. 39.

<sup>2</sup> 5 B. & S. 384; 33 L. J. Q. B.249.

## W. CORCORAN AND WIFE v. CORCORAN.

IN THE EXCHEQUER, IRELAND, NOVEMBER 16, 17, 1857.

[Reported in 7 Irish Common Law Reports, 272.]

DEFAMATION. — The summons and plaint stated the speaking of words imputing prostitution to the plaintiff Anne, and calling her a vagabond, with an innuendo that this word imputed that she was a vagrant without a fixed place of abode. By means of the committing of which several grievances, the said plaintiff Anne hath been injured in her credit and reputation, and brought into disgrace with her acquaintances, in so much that her brother K. Dooley, who had promised to supply the said Anne with means to enable her to emigrate to Australia to join her husband, has now, in consequence of the imputations cast upon her character by the said defendant, retracted his promise until the truth or falsehood of the said charges shall have been first ascertained and established; whereby, &c.

Demurrer.

*Sidney* (with whom was *E. Hayes*), for the demurrer.

*Mullins* and *D. Lynch*, contra.

PENNEFATHER, B.<sup>1</sup> It certainly does strike me that this summons and plaint would not be good without the allegation of special damage.

Then, as to the special damage laid. I certainly agree that mere apprehension of damage would not be a sufficient statement; but here a promise has been laid. It is argued that no averment of the promisor's intention to perform it has been made, but I think it must be taken that he intended to perform it, until the contrary be shown. In cases of actions for breach of promise, as, for instance, of marriage, there is never any allegation contained to that effect, nor could it be maintained that, without such an averment, the pleading would not be sufficient.

Then follows an allegation here that, by reason of the speaking of the words, the promisor retracted his promise, and broke off his treaty of giving the plaintiff funds to enable her to emigrate. Now, if the words stopped there, I think there is no question whatever but there was special damage sustained by the breach of a promise which must have been beneficial to the plaintiff. The demurrer must be overruled.

<sup>1</sup> The case is materially abridged. — Ed.

## MILLER v. DAVID.

IN THE COMMON PLEAS, JANUARY 20, 1874.

*[Reported in Law Reports, 9 Common Pleas, 1187.]*

THE first count stated that the defendant falsely and maliciously published of the plaintiff, a stone-mason, and employed as such in certain works carried on by one Mayberry, these words: "He was the ringleader of the nine-hours system," whereby and by means of which premises the plaintiff was injured in his occupation of a stone-mason, and was discharged from his said employment at the said works, to wit, the Old Castle Iron and Tin Plate Works, and was without and could not obtain employment for a considerable time, and could get no employment but one of less value to the plaintiff, the place of employment being distant from his place of abode, and his necessary meals thereby becoming more costly, and such place of employment being exposed to wet weather.

The second count was similar, except that the words spoken were: "He has ruined the town by bringing about the nine hours system, and he has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly."

Demurrer, on the ground that the words were not in themselves defamatory, and that special damage consequent thereon, therefore, gave no action. Joinder in demurrer.<sup>1</sup>

Jan. 20. The judgment of the court (LORD COLERIDGE, C. J., and KEATING, BRETT, and DENMAN, JJ.) was delivered by

LORD COLERIDGE, C. J. In this case time was taken to consider our judgment, from the wish entertained by at least one member of the court to hold, if there were authority for the proposition, that a statement false and malicious made by one person in regard to another, whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration; for to call a man "the ringleader of the nine hours system," and to say of him that he "had ruined a place by bringing about that system," could not under many circumstances and at the hands of many people do the subject of such statement any damage at all. But we are unable to find any authority for a proposition so wide and general in its terms as would alone support this action.

The rule, as laid down by De Grey, C. J., in *Onslow v. Horne*, that words are actionable if they be of probable ill consequence to a person in a trade or profession, or an office, is expressly disapproved of by the

<sup>1</sup> The statement of the counts is abridged, and the arguments of counsel are omitted. — Ed.

Court of Exchequer in *Lumby v. Allday*. Bayley, B., there says: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, or the like, or connects the imputation with the plaintiff's office, trade, or business." In that case, the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company. But the court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk. That case and the language of Bayley, B., in delivering the judgment of the court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader;" and, as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import; for, amongst other authorities, he cites Barrow as calling St. Peter the "ringleader" of the Apostles.<sup>1</sup> Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication; so that, on neither ground can the declaration be supported. There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch v. Knight*<sup>2</sup> appears in favor of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it; and upon this demurrer there must be judgment for the defendant.

*Judgment for the defendant.*

<sup>1</sup> "It may be reasonable to allow St. Peter a primary of order, such a one as the ringleader hath in a dance." — Barrow's *Treatise of the Pope's Supremacy*, Oxford edition of Works, 1830, vol. vii. p. 70. In Fox's Preface to Tyndall's Works, "these three learned fathers of blessed memory, William Tyndall, John Frith, and Robert Barons," are styled "chief ringleaders in these latter tymes of thys Church of England."

<sup>2</sup> 9 H. L. C., at p. 600.

# SHEPPARD v. WAKEMAN.

IN THE KING'S BENCH, HILARY TERM, 1662.

[Reported in 1 *Levins*, 58.]

CASE where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsely and maliciously, to hinder the marriage, wrote a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved that the action did not lie, the

## SECTION IV.

*Justification.*

## (a) TRUTH OF PUBLICATION.

## ALVAN W. FOSS v. HORACE T. HILDRETH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1865.

[Reported in 10 Allen, 76.]

CHAPMAN, J. The defendant's counsel requested the court to give certain instructions to the jury, as stated in the bill of exceptions. One of the instructions prayed for was, that the truth is not a defence to an action of slander, if the words were spoken maliciously or without any reason on the part of the defendant to believe they were true.<sup>1</sup> But in respect to verbal slander the law has always been otherwise. A special plea in justification sets forth the truth of the words merely. 3 Chit. Pl. 1031. *Exceptions overruled.*<sup>2</sup>

<sup>1</sup> Only the opinion of the court upon this point is given. — ED.

<sup>2</sup> Lucas v. Cotton, Moore, 79; Underwood v. Parks, 2 Stra. 1200; Ellis v. Buzzell, 60 Me. 209; Baum v. Clause, 5 Hill, 196 *Accord*.

The rule is the same as to actions for a libel. Leyman v. Latimer, 3 Ex. D. 15, 352; Castle v. Houston, 19 Kas. 417. Unless modified by statute, as in Massachusetts. Perry v. Porter, 124 Mass. 338.

The plea of truth is construed with great strictness. For example, in an action for saying "The plaintiff is a felon," the plea of truth is not made out if the plaintiff has received a pardon for a felony actually committed; for from the moment of the pardon he ceased to be a felon. Leyman v. Latimer, *supra*. — ED.

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defendant claiming title to her herself, like as Gerrard's Case, 4 Co., for slander of title. But after divers motions, the plaintiff had judgment, for it is found to be malicious and false; and if such an action should not lie, a mean and a base person might injure any person of honor and fortune by such a pretence.



SECTION IV. (*continued.*)

## (b) REPETITION OF ANOTHER'S STATEMENT.

## McPHERSON v. DANIELS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1829.

[*Reported in 10 Barnewall & Cresswell, 263.*]

SLANDER for an imputation of insolvency. The defendant pleaded that at the time of uttering the said words he declared that he had heard and been told the same from and by one T. W. Woor. General demurrer.<sup>1</sup>

LITLEDALE, J. For the reasons already given by my Brother Bayley, I think that the plea is bad; but with reference to the resolution in Lord Northampton's case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumors, either of the king or of any of the grantees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means *they may be published generally.*" It was resolved then, that in the case of *scandalum magnatum* it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz. the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by showing that he named his original author, I think that it is not law.

The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law *prima facie* presumes a consequent damage without proof. In other cases actual damage must be proved. (To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative

<sup>1</sup> The statement of the pleadings is abridged, and only the opinion of LITLEDALE, J., is given. BAYLEY and PARKE, JJ., concurred. — ED.

the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. ) It is competent to a defendant, upon the general issue, to show that the words were not spoken maliciously; by proving that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice, (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant, by showing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it show that the plaintiff is not entitled to recover damages.

*Judgment for plaintiff.*<sup>1</sup>

<sup>1</sup> That the defendant repeated a defamation, giving the name of the author, seems originally to have been a justification. *Northampton's Case*, 12 Rep. 134 (Fourth Resolution). But the name of the author was to be given at the time of repetition, and not for the first time in the plea. *Davis v. Lewis*, 7 T. R. 17. The words, furthermore, had to be given with sufficient exactness to ground an action against the author. *Maitland v. Goldney*, 2 East, 426. Doubts were thrown upon the validity of this justification in *Lewis v. Walter*, 4 B. & Al. 605. The whole doctrine was repudiated, as to libel, in *De Crespigny v. Wellesley*, 5 Bing. 392, and *Tidman v. Ainslie*, 10 Ex. 63; and as to slander, in *McPherson v. Daniels*; *Watkin v. Hall*, L. R. 3 Q. B. 396. — Ed

SECTION IV. (*continued.*)

(c) LEAVE AND LICENSE.

## HOWLAND v. BLAKE MANUFACTURING CO.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 22, 1892.

[Reported in 156 *Massachusetts Reports*, 543.]

KNOWLTON, J. 6.<sup>1</sup> The jury were instructed that, "if the defendant gave a copy of the libel to Berry, there having been no previous publication by the defendant, and Berry in procuring such copy acted as the agent of the plaintiffs, and at their request, and such publication was procured with the view to bringing action, the publication was privileged." This was in accordance with views expressed by English judges, and was sound in principle. *Rogers v. Clifton*,<sup>2</sup> *Duke of Brunswick v. Harmer*,<sup>3</sup> *King v. Waring*,<sup>4</sup> *Smith v. Wood*,<sup>5</sup> *Odgers, Libel and Slander*, 229. If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of a wrongful act should be permitted to profit by it.<sup>6</sup>

<sup>1</sup> Only the opinion of the court upon this point is given. — ED.

<sup>2</sup> 3 Bos. & P. 587, 592.

<sup>3</sup> 14 Q. B. 185.

<sup>4</sup> 5 Esp. 13.

<sup>5</sup> 3 Camp. 323.

<sup>6</sup> *King v. Waring*, 5 Esp. 13; *Rogers v. Clifton*, 3 B. & P. 587, 592; *Weatherston v. Hawkins*, 1 T. R. 110, 112; *Smith v. Wood*, 3 Camp. 323; *Duke v. Harmer*, 14 Q. B. 185; *Palmer v. Hummerston*, 1 Cab. & E. 36; *Gordon v. Spencer*, 2 Blackf. 286; *Sutton v. Smith*, 13 Mo. 120 *Accord.* — ED.

## SECTION V.

*Absolute Privilege.*

## SCOTT v. STANSFIELD.

IN THE EXCHEQUER, JUNE 3, 1868.

[*Reported in Law Reports, 3 Exchequer, 220.*]

DECLARATION that the defendant published of the plaintiff in relation to his business as a scrivener these words: "You are a harpy, preying on the vitals of the poor."

Plea: That the defendant uttered the said words while acting as a judge in the trial of a cause wherein the now plaintiff was defendant.

Replication: That the words were spoken falsely and without reasonable cause, and were wholly irrelevant and impertinent to the cause before the defendant as the latter then well knew.

Demurrer.<sup>1</sup>

KELLY, C. B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the Superior Courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had

<sup>1</sup> The statement of the pleadings is abridged; the arguments of counsel and the concurring opinions of MARTIN, CHANNELL, and BRAMWELL, BB., are omitted. — ED.

commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

*Judgment for the defendant.*<sup>1</sup>

## SEAMAN v. NETHERCLIFT.

IN THE COURT OF APPEAL, DECEMBER 15, 1876.

[Reported in 2 Common Pleas Division, 53.]

APPEAL from the decision of the Common Pleas Division, ordering judgment to be entered for the defendant.<sup>2</sup>

Claim: That defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: That defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: That the words were not *bona fide* spoken by defendant as a witness, or in answer to any question put to him as a witness, and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.<sup>3</sup>

COCKBURN, C. J. The case is, to my mind, so abundantly clear, and I believe to the minds of my learned brothers, that I think we ought not to hesitate to at once pronounce our decision.

<sup>1</sup> *Rex v. Skinner*, Loft, 55; *Thomas v. Churton*, 2 B. & S. 475; *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Prince Edward*, 1 Q. B. D. 499; *Miller v. Hope*, 2 Shaw, Ap. Cas. 125; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395 (but see *Aylesworth v. St. John*, 25 Hun, 156) *Accord*.

*Kendillon v. Maltby*, Car. & M. 402, 2 M. & Rob. 438, s. c., lays down too restricted a rule.

Compare *Allardice v. Robertson*, 1 Dow. & Cl. 495. — ED.

<sup>2</sup> 1 C. P. D. 540.

<sup>3</sup> The arguments of counsel and the opinion of AMPHLETT, J. A., are omitted. — ED.

The plaintiff brings his action against the defendant for slander, alleged to have been uttered on the occasion of a prosecution for forgery before a magistrate of the city of London. The defence set up is: "True, I did utter the words imputed to me, but I spoke them when I was a witness in a case in which I was called as a witness." The plaintiff's answer to that is, "Yes, you were called as a witness, but you spoke these words when you were no longer giving evidence, and not only knowing them to be false, but also not in the inquiry, and dehors altogether the subject-matter of the inquiry, for your own purpose of maliciously defaming me." At the trial before Lord Coleridge it appeared that in the Probate suit of *Davies v. May* the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery before the magistrate, the defendant was called as an adept by the person charged, when he expressed an opinion favorable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of *Davies v. May*. He answered, "Yes." And he was then asked, "Did you read a report of the observations which the presiding judge made on your evidence?" He again said, "Yes." And then the counsel stopped. I presume the circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness, expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject-matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the court should be of opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken, not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.

Now, if the findings of the jury had been founded upon evidence by which they could have been supported, I might have had some hesitation about the decision. But they were not; and we are asked to come to a conclusion contrary to what has been established law for nearly three centuries.

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy

or irrelevancy of what he says ; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord Rokeby*,<sup>1</sup> after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious ; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough.<sup>2</sup> Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked, "Were you at York on a certain day?" and he were to answer, "Yes, and A. B. picked my pocket there;" it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege.

If, therefore, the findings of the jury, that the defendant had ceased to be a witness when he spoke the words, were justified by the evidence, I should hesitate before I decided in his favor. But I think the defendant was entitled to judgment on the first reservation. There was no evidence to go to the jury upon the plaintiff's case. What the defendant said was said in his character of witness ; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops ; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance. That being so, the witness himself, who is sworn to speak the whole truth, is properly entitled, not only with a view to his own vindication, but in the interest of justice, to make such an observation in explanation

<sup>1</sup> Law Rep. 7 H. L. 744.

<sup>2</sup> *Trotman v. Dunn*, 4 Camp. 211.

of his former answer as is just and fair under the circumstances. That is what the defendant did. The sitting magistrate having allowed the disparaging question to be put and answered, ought not to have interfered to prevent the defendant from giving an explanation. I think the statement, coming immediately after the damaging question had been put to him, must be taken to be part of his testimony touching the matter in question, as it affects his credibility as a witness in the matter as to which he was called. It was given as part of his evidence before he had become divested of his character of witness; and but for the question of the opposite counsel he never would have made the statement at all.

As to the finding of malice, it is true that what the defendant said might possibly have the effect of damaging the plaintiff's character; but can any one suppose that the defendant had this in his mind when he spoke, or that he intended to injure the plaintiff? He thought only of his own credit as a witness, which had been attacked. He spoke, on the impulse of the moment, no doubt very foolishly; and it was probably his foolish persistence in maintaining the same attitude and setting up his own opinion against the positive testimony of the other witnesses that prejudiced the jury against him, and led them to return the findings they did, founded, in reality, upon no evidence at all. In my opinion, the Lord Chief Justice should have nonsuited the plaintiff, which is the conclusion at which the Court of Common Pleas ultimately arrived; for there really was no evidence that the defendant was speaking otherwise than as a witness and relevantly to the matters in issue, because relevantly to his own character and credibility as a witness in the matter. That being so, even if express malice could have been properly inferred from the circumstances, the case of *Dawkins v. Lord Rokeby*<sup>1</sup> conclusively decides that malice has ceased to be an element in the consideration of such cases, unless it can be shown that the statement was made not in the course of giving evidence, and therefore not in the character of a witness. A long series of authorities, from the time of Elizabeth to the present time, has established that the privilege of a witness while giving evidence is absolute and unqualified. *Allardice v. Robertson*<sup>2</sup> was relied upon by Mr. Chambers. That was the case of an action against a magistrate for words spoken on the bench, and Lord Wynford expressly distinguishes the two cases, and says that the privilege of a judge of the superior courts does not apply to the judge of an inferior court; and that in the case of the latter the privilege is not absolute and unqualified, and that a "subordinate judge" would be liable to an action if malice were proved. It does not, therefore, touch the present case; and as to a witness speaking with reference to the subject-matter of the issue, it is clear that the privilege is unqualified.

The judgment of the Common Pleas Division must, therefore, be affirmed.

<sup>1</sup> Law Rep. 7 H. L. 744.

<sup>2</sup> 1 Dow. N. S. 495, 515.



BRAMWELL, J. A. I am of the same opinion. The judgment of the Common Pleas affirmed two propositions. First, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; secondly, that, that being so, the Lord Chief Justice should have stopped the trial of the action by nonsuiting the plaintiff.

As to the first proposition, I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in *Dawkins v. Lord Rokeby*<sup>1</sup> would seem preferable, "having reference," or "made with reference to the inquiry." Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: "Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies v. May*?" What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed, "ingeniously suggestive," viz. that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct opposition to the positive testimony of eye-witnesses. But he foolishly, as I think, and coarsely exclaimed, "I believe that will to be a rank forgery, and shall believe so to the day of my death." Suppose after he had said "yes," he had added in a decent and becoming manner, "and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right." Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that statement in justification of himself? Surely, yes. Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, "That man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should

<sup>1</sup> Law Rep. 7 H. L., at p. 744.

<sup>2</sup> Law Rep. 7 H. L. 744.

be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry.

As to the second proposition, that, if the first be made out, no inquiry can be gone into as to whether the statement was false or malicious or as a volunteer, we are bound by authority. The case of *Dawkins v. Lord Rokeby*<sup>1</sup> is directly in point, and binding upon us even if we disliked the decision. Mr. Chambers has not attempted to distinguish that case except on the ground that the inquiry in that case was before a military court. But it is clearly not distinguishable on that ground. The learned Lords determined that what is true of a civil tribunal is true of a military court of inquiry; and they affirmed most distinctly the proposition that if the evidence has reference to the inquiry, the witness is absolutely privileged. There is also the case in the Court of Error of *Henderson v. Broomhead*,<sup>2</sup> which is precisely to the same effect, and undistinguishable from the present case.

I am, therefore, of opinion that the judgment of the Common Pleas Division is right, and must be affirmed. *Judgment affirmed.*<sup>3</sup>

<sup>1</sup> Law Rep. 7 H. L. 744.

<sup>2</sup> 4 H. & N. 569.

<sup>3</sup> *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Dawkins v. Rokeby*, L. R. 7 H. L. 744, L. R. 8 Q. B. 255 (Military court of inquiry); *Goffin v. Donnelly*, 6 Q. B. D. 307 (Select committee of House of Commons); *Gompas v. White*, 6 T. L. R. 20; *Terry v. Fellows*, 21 La. An. 375; *Hunckle v. Voneiff*, 69 Md. 173; *Runge v. Franklin*, 72 Tex. 585; *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195 *Accord.*

See also *Hutchinson v. Lewis*, 75 Ind. 55; *Liles v. Gaster*, 42 Oh. St. 631.

In *Dawkins v. Lord Rokeby*, *supra*, Lord Penzance said: "It is said that a statement of fact of a libellous nature which is palpably untrue — known to be untrue by him who made it, and dictated by malice — ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.

"But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open

## MUNSTER v. LAMB.

IN THE COURT OF APPEAL, JULY 5, 1883.

[Reported in 11 Queen's Bench Division, 588.]

BRETT, M. R.<sup>1</sup> This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been.

It has been contended that as a person defamed has, *prima facie*, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts: it consists of a number of principles, which are recognized as having existed during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume a power of that kind: they only endeavor to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts. Therefore, with regard to the present case, we have to find out whether there is a principle of the common law, which although it has existed

to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands.

"These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result." — ED.

<sup>1</sup> Only the opinion of BRETT, M. R., is given. — ED.

from the beginning, is now to be applied for the first time. I cannot find that there has been a decision of a court of law with reference to such facts as are now before us, that is, with regard to a person acting in the capacity of counsel: but there have been decisions upon analogous facts; and if we can find out what principle was applied in these decisions upon the analogous facts, we must consider how far it governs the case before us.

Actions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. It is not that these statements are libel or slander subject to a defence, but the principle is that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander of which the law takes notice. Many privileged occasions have been recognized. The occasion, with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates: it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of an inquiry as to the administration of the law. It was admitted that so long as an advocate acts *bona fide* and says what is relevant, owing to the privileged occasion, defamatory statements made by him do not amount to libel or slander, although they would have been actionable if they had not been made whilst he was discharging his duty as an advocate. But it was contended that an advocate cannot claim the benefit of the privilege unless he acts *bona fide*, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. Certain persons can claim the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration I may say that those persons are judges, advocates, parties, and witnesses. There have been decisions with regard to three of these classes, namely, judges, parties, and witnesses, and it has been held that whatever they may have said in the course of an inquiry as to the administration of the law, has been said upon a privileged occasion, and that they are not liable to any action for libel or slander. But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are, judges, parties, and witnesses, who make statements without malice and relevantly; and that those judges, parties, and witnesses, who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. I am inclined to think that with regard to these classes of persons the law has not always been

stated in the same manner by the judges, and some judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted. With regard to witnesses, the chief cases are, *Revis v. Smith*,<sup>1</sup> and *Henderson v. Broomhead*,<sup>2</sup> and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the court — whether what they say is relevant or irrelevant, whether what they say is malicious or not — are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, on *viva voce* examination, or whether it has been made upon affidavit. It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false to the knowledge of the witness, and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable. If an action for libel or slander cannot be maintained, how can such an action as I have mentioned be maintained, it being in truth an action for defamation in an altered form? Every objection and every reason, which can be urged against an action for libel or slander, will equally apply against the suggested form of action. Therefore, to my mind, the best way to deal with the suggested form of action is to dispose of it in the words of Crompton, J., in *Henderson v. Broomhead*, where he said: “The attempts to obtain redress for defamation having failed, an effort was made in *Revis v. Smith*<sup>1</sup> to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair.” Nothing could be more strong, nothing could show more clearly his entire disbelief in the possibility of supporting that new form of action. The answer to the suggested form of action was that during the hundreds of years which had elapsed such an action never had been sustained. No reported case from the time of the commencement of the common law until the present day can be found in which the suggested form of action has been maintained, and yet it is impossible to suppose that opportunities for bringing actions of that kind and of carrying them to a conclusion have not occurred again and again. However, the question is not as to the form of the action, but whether an action of any kind will lie for defamation uttered in the course of a judicial proceeding. Crompton, J., in *Henderson v. Broomhead*, also said: “No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be

<sup>1</sup> 18 C. B. 126; 25 L. J. C. P. 195.

<sup>2</sup> 4 H. & N. 569.

said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. Cresswell, J., pointed out in *Revis v. Smith*<sup>1</sup> that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court." It is there laid down that the reason for the rule with regard to witnesses is public policy. In *Scott v. Stansfield* it was held that all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously and without reasonable or probable cause. The ground of the decision was that the privilege existed for the public benefit: of course it is not for the public benefit that persons should be slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty. Therefore the cases of both witnesses and judges fall within the rule as to privileged occasions, notwithstanding it may be proved that any defamatory words spoken by them were uttered from an indirect motive and to gratify their own malice. In *Dawkins v. Lord Rokeby*<sup>2</sup> it was assumed for the purposes of the decision, that the defendant had been guilty of both falsehood and malice; nevertheless it was held that no action would lie against him for statements made by him as a witness. The ground of the decision was no doubt that a witness in giving his evidence should not be afraid of being sued for anything that he might say. A similar view of the law was taken in *Seaman v. Netherclift*; and the same rule has been applied to the parties. If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes — judge, witness, and counsel — it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says

<sup>1</sup> 18 C. B. 126.<sup>2</sup> Law Rep. 8 Q. B. 255.

is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bona fide*, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. In *Rex v. Skinner*,<sup>1</sup> Lord Mansfield, a judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a judge or a witness. In *Dawkins v. Lord Rokeby*<sup>2</sup> a most careful judgment was delivered on behalf of all the judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with judges and witnesses. I will refer to *Kennedy v. Hilliard*,<sup>3</sup> and in that case Pigott, C. B., delivered a most learned judgment, in the course of which he said: <sup>4</sup> "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, *bona fides*, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.

I am of opinion that the rule of law is such as I have pointed out,

<sup>1</sup> Loft, 55.

<sup>2</sup> Law Rep. 8 Q. B. 255, at pp. 263, 264, 268.

<sup>3</sup> 10 Ir. C. L. Rep. N. S. 195.

<sup>4</sup> 10 Ir. C. L. Rep., at p. 209.

that it ought to be applied in the present case, and therefore that this action cannot be maintained.

From our judgments it is obvious that we dissent from the opinion of Lord Denman, C. J., expressed by him at *Nisi Prius* in *Kendillon v. Maltby*.<sup>1</sup>

*Appeal dismissed.*<sup>2</sup>

## GILBERT v. THE PEOPLE.

IN THE SUPREME COURT, NEW YORK, MAY, 1841.

[Reported in 1 *Denio*, 41.]

*By the Court*, BEARDSLEY, J.<sup>3</sup> Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor or counsel therein, if pertinent and material to the matter in controversy, is privileged, and consequently lays no foundation for a private action or a public prosecution. The general language of elementary writers is, that whatever occurs in the regular course of justice is privileged, (Hawk. P. C., B. 1, ch. 73, § 8; 3 Chit. Cr. Law, 869; 1 Saund. 131 (1.); 1 Russ. on Crimes, 307; Bac. Abr. Libel, A. 4;) and by which they intend to indicate the principle I have stated. If what is said or written is pertinent and material to the controversy, the protection to parties and those who represent them, (for all stand on the same ground,) is absolute and unqualified, and no one shall be permitted to allege that it was done with malice. But this is the extent of the privilege; for if a party or his agent will pass beyond the prescribed limit to asperse and vilify another, by word or writing, he is without protection, and, as in other cases, must abide the consequences of his own misconduct. If slanderous words are used, he is a slanderer; and if he offends in writing, he is a libeller, and may be prosecuted both civilly and criminally as such. *Hastings v. Lusk*,<sup>4</sup> *Hodgson v. Scarlet*,<sup>5</sup> *Ring v. Wheeler*.<sup>6</sup> See also *Thorn v. Blanchard*.<sup>7</sup>

This being the principle which must govern all cases of this character, it is only necessary to see how it applies to the one now before us. The alleged libellous matter was part of a declaration in a justice's court, which was prepared and presented to the justice by the plaintiff in error, who acted on that occasion as counsel for the plaintiffs in the cause. The action was trespass, for entering the close of

<sup>1</sup> Car. & M. 402; 2 M. & R. 438.

<sup>2</sup> *Pedley v. Morris*, 61 L. J. Q. B. 21 *Accord*.

See *Buckley v. Wood*, 4 Rep. 14 *b*; *Hodgson v. Scarlet*, 1 B. & Ald. 232; *Mackay v. Ford*, 5 H. & N. 792. — ED.

<sup>3</sup> Only the opinion of the court is given. — ED.

<sup>4</sup> 22 Wend. 410.

<sup>5</sup> 1 Barn. & Ald. 232.

<sup>6</sup> 7 Conn. R. 725.

<sup>7</sup> 5 John. R. 508.



the plaintiffs and taking and killing divers sheep, and for other alleged injuries to sheep, wool, sheepskins and mutton. Supposing the declaration in stating these grievances to be free from objection, it still had other statements and insinuations which could not but have been intended to stir up the passions of the defendant in that suit, and to make him an object of dark suspicion as well as of ridicule and contempt. The declaration alleged that the defendant was "reported to be fond of sheep, bucks and ewes, and of wool, mutton and lambs," and "in the habit of biting sheep;" and it was added that if guilty he "ought to be hanged or shot." These and other suggestions of the like character, to be found in this declaration, were in no respect relevant or material to the action, and obviously must have been thrown in to scandalize and annoy the defendant. What had the court to do with these alleged "reports" and "habits"? Certainly nothing. They could have no possible bearing on the issue to be tried, or the damages which might be assessed for the alleged trespass, although they might very well serve to irritate and disgrace the party who was charged to be the subject of such reports and habits. It would be lamentable if irrelevant, gratuitous and malicious attacks could be excused, because inserted in a declaration upon other and distinct causes of action, and with which the vituperative charges had no connection whatever. The demurrer admits that these charges and insinuations were false and malicious, and as they were in no sense pertinent to the action, they were libellous.

*The judgment should be affirmed.*

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J. N. WHITE, RESPONDENT, v. D. L. CARROLL, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, 1870.

[Reported in 42 New York Reports, 161.]

SUTHERLAND, J.<sup>1</sup> On the trial of this action, before Mr. Justice Potter and a jury at the circuit, it appeared, that in 1858 and 1859, a proceeding was going on before the surrogate of Montgomery county, in which the contested point or question was the testamentary capacity of one Jay Phillips; that the plaintiff and the defendant were both at the time, and for some years previously had been, practising as physicians at Amsterdam, Montgomery county, the plaintiff as a homœopathic physician, and the defendant as an allopathic physician; that both had been sworn as witnesses, and testified in the proceedings before the surrogate, the defendant some time after the plaintiff; that

<sup>1</sup> Only part of the opinion of the court is given. — Ed.

on the examination of the defendant as such witness, he was asked whether any other physician was in attendance on Jay Phillips, at the time he was attending him, and that he answered: "Not as I know of." That he was then asked: "Did not any physician attend him, at the time he was at Mrs. Moore's, when you did not?" That to this question, the defendant answered: "Not as I know of; I understand he had a quack, I would not call him a physician; I understood that Dr. White, as he is called, had been there." That this evidence was reduced to writing by the surrogate, and filed in the surrogates' office; and thereupon this action was brought, the complaint in which contains two counts, one for libel, or for words written; and the other for slander, or for words spoken.

No point was made on the trial of the action, that the words alleged in the complaint had not been proved to have been spoken by the defendant, but a motion was made on his part to dismiss the complaint, substantially upon the ground that the words spoken by the defendant were not actionable, because they were spoken on his examination as a witness, and were spoken as pertinent and responsive to the questions asked him.

Justice Potter denied the motion to dismiss the complaint, and the defendant excepted.

In submitting to the jury the question, "whether the defendant, at the time he so testified and used the words in question, believed the words so used by him were relevant or pertinent to the question then on trial," Justice Potter charged the jury as follows: "That if the jury believed, from all the circumstances proved, from the questions put to him, and from his manner of answering, and from the answers themselves, that he testified in good faith, or in the belief that his answers were pertinent and relevant, then the law protected him in what he said; it was privileged, and their verdict should be for the defendant. That if, on the contrary, they should believe from this evidence, that the defendant, though testifying at the time as a witness, and as such entitled to the protection of the law, in so using the words proved, was actuated by malice; that he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the slander, or of publishing the libel."

There is certainly some doubt whether the defendant's exception, which he claims applies to this part of the charge, was sufficiently specific or definite to raise the question as to its correctness; but I shall assume that it was; and I shall also assume, in view of what I have said preliminarily, as the counsel for the defendant assumed on the argument, and assumes in his points, that the only material questions presented by this appeal, are those presented by the two exceptions referred to.

Now, as to the first, it is perfectly clear, that the question, whether the defendant was protected under the circumstances, was not a ques-

tion of law for the court, but was a question of fact for the jury. It was really a question of conduct, of motive, of good faith and honest purpose, or of bad faith and malicious purpose.

The question was, whether the defendant did, or did not, avail himself of the occasion to maliciously answer the questions put to him as a witness, in the way he did.

This question was most emphatically a question for the jury; and, I think it was submitted to the jury as favorably for the defendant as he had a right to expect or ask.

It is true, that in submitting it to the jury, Justice Potter assumed that the defendant, when he answered the questions as he did, knew what the question in the proceeding before the surrogate was; but Justice Potter had a right to assume this under the circumstances.

I think the judgment should be affirmed, with costs.

All concur for affirmance.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> "White v. Carroll, rightly understood, is in harmony with the other cases. The case shows that the court held that the answer given to the question put to the defendant as a witness before the surrogate was not material and pertinent to the inquiry; and further held it was privileged if the defendant, when he gave it, in good faith believed that it was; and whether he so believed, was a question of fact to be determined by the jury. Had the evidence proved that the answer was material and pertinent, the court must have held it privileged, irrespective of the defendant's belief upon the subject." — *Per* GROVER, J., in *Marsh v. Ellsworth*, 50 N. Y. 309, 313.

"It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case." — *Per* LORD, J., in *McLaughlin v. Cowley*, 127 Mass. 316, 319.

"The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected. It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant. As the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry, and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this Commonwealth. The English decisions, perhaps, go somewhat further than this in favor of a witness; certainly they apply the rule liberally for his protection." — *Per* FIELD, J., in *Wright v. Lothrop*, 149 Mass. 385, 389.

The principal case and the preceding extracts in this note represent the views of the American courts in general.

*Lawson v. Hicks*, 38 Ala. 279; *Wyatt v. Buell*, 47 Cal. 624; *Hollis v. Meux*, 69 Cal. 625; *People v. Green*, 9 Colo. 506; *Lester v. Thurmond*, 51 Ga. 118; *Spaids v. Barrett*, 57 Ill. 290; *Fagan v. Fries*, 30 Ill. Ap. 236; *Smith v. Howard*, 28 Iowa, 51; *Hawk v. Evans*, 76 Iowa, 593; *Forbes v. Johnson*, 11 B. Mon. 48; *Morgan v. Booth*, 13 Bush, 480; *Stewart v. Hall*, 83 Ky. 375; *Kelly v. Lafitte*, 28 La. An. 435; *Gardemal v. McWilliams*, 43 La. An. 454; *Barnes v. McCrate*, 32 Me. 442; *Hyatt v. Wood*, 3 Met. 193; *Kidder v. Parkhurst*, 3 All. 393; *McLaughlin v. Cowley*, 127 Mass. 316;

Wright v. Lothrop, 149 Mass. 384; Wheaton v. Beecher, 49 Mich. 348; Hastings v. Lusk, 22 Wend. 410; Ring v. Wheeler, 7 Cow. 725; Garr v. Selden, 4 N. Y. 91; Marsh v. Ellsworth, 50 N. Y. 309; Moore v. Manufacturing Co., 123 N. Y. 420, 136 N. Y. 666; Newfield v. Copperman, 15 Abb. Pr. N. S. 360; Perkins v. Mitchell, 31 Barb. 461; Dada v. Piper, 41 Hun, 254; McLaughlin v. Charles, 60 Hun, 239; Suydam v. Moffatt, 1 Sandf. 459; Perzel v. Tousey, 52 N. Y. Sup'r Ct. 79; Shadden v. McElwee, 86 Tenn. 146; Mower v. Watson, 11 Vt. 536; Dunham v. Powers, 42 Vt. 1; Johnson v. Brown, 13 W. Va. 71; Jennings v. Paine, 4 Wis. 358; Calkins v. Sumner, 13 Wis. 193; Larkin v. Noonan, 19 Wis. 82. — ED.

## SECTION VI.

*Fair Comment or Criticism.*SIR JOHN CARR, KNIGHT, v. HOOD AND ANOTHER.<sup>✓</sup>BEFORE LORD ELLENBOROUGH, LONDON SITTINGS AFTER TRINITY  
TERM, 1808.*[Reported in 1 Campbell, 355, n.]*

THE declaration stated, that the plaintiff, before the publishing of any of the false, scandalous, malicious, and defamatory libels therein-after mentioned, was the author of, and had sold for divers large sums of money, the respective copyrights of divers books of him the said Sir John, to wit a certain book entitled "The Stranger in France," a certain other book, entitled "A Northern Summer," a certain other book, entitled "The Stranger in Ireland," &c. which said books had been respectively published in 4to. yet that defendant intending to expose him to, and to bring upon him great contempt, laughter and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John, and of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled "My Pocket Book, or Hints for a Ryghte Merrie and conceited Tour, in quarto, to be called The Stranger in Ireland in 1805, (thereby alluding to the said book of the said Sir John, thirdly above mentioned,) by a knight errant (thereby alluding to the said Sir John)," and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2dly above mentioned, therein called, "Frontispiece," and entitled "The Knight (meaning the said Sir John) leaving Ireland with Regret," and containing and representing in the said print; a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with, and bending under the weight of three large books, one of them having the word "Baltic," printed on the back thereof, &c. and a pocket-handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "wardrobe" depending therefrom, (thereby falsely, scandalously, and maliciously, meaning and intending to represent, for the

purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2dly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket-handkerchief,) and which said libel also contained, &c. &c. The declaration concluded by laying as special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Philips Knt. for a large sum of money to wit £600, the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an account of a tour of him the said Sir John through part of Scotland, which but for the publishing of the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Philips for the said last mentioned sum of money, and the same remained wholly unsold and undisposed of, and was greatly depreciated and lessened in value to the said Sir John. — Plea, not guilty.

LORD ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

*Garrow*, for the plaintiff, allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by the defendants clearly was, by means of immoderate ridicule to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tipper v. Tabbart*<sup>1</sup> his lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and

<sup>1</sup> 1 Camp. 350.

errors of another may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's "Tour through Scotland" is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? but shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. — Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

The *Attorney-General* having addressed the jury on behalf of the defendants —

LORD ELLENBOROUGH said, Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for ought I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them, — to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. — I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he

was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold. — The CHIEF JUSTICE concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.

*Verdict for the defendants.*<sup>1</sup>

## CAMPBELL v. SPOTTISWOODE.

IN THE QUEEN'S BENCH, APRIL 18, 1863.

[*Reported in 3 Best & Smith, 769.*]

**LIBEL** for a publication in the Saturday Review.

COCKBURN, C. J.<sup>2</sup> I am of opinion that there ought to be no rule. The article on which this action is brought is undoubtedly libellous. It imputes to the plaintiff that, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper. The article also charges that, in furtherance of that base and sordid purpose, he published in his newspaper the name of a fictitious person as the authority for his statements, and still further that, with a view to induce persons to contribute towards his professed cause, he published a fictitious subscription list. These are serious imputations upon the plaintiff's moral as well as public character.

It is said, on behalf of the defendant, that, as the plaintiff addressed himself to the public in a matter, not only of public, but of universal interest, his conduct in that matter was open to public criticism, and

<sup>1</sup> *Dibdin v. Swan*, 1 Esp. 28; *Heriot v. Stuart*, 1 Esp. 437; *Stuart v. Lovell*, 2 Stark. 93 (*seem*); *Tabart v. Tipper*, 1 Camp. 350 (*seem*); *Dunne v. Anderson*, Ry. & M. 287, 3 Bing. 88, s. c.; *Soane v. Knight*, M. & M. 74; *Thompson v. Shackell*, M. & M. 187; *Macleod v. Wakley*, 3 C. & P. 311; *Fraser v. Berkeley*, 7 C. & P. 621; *Evans v. Harlow*, Dav. & M. 507; *Paris v. Levy*, 9 C. B. N. S. 342; *Eastwood v. Holmes*, 1 F. & F. 347; *Hibbs v. Wilkinson*, 1 F. & F. 608; *Turnbull v. Bird*, 2 F. & F. 508; *Strauss v. Francis*, 4 F. & F. 939, 1107, 15 L. T. Rep. 674; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; *Mulkern v. Ward*, 13 Eq. 619, 622; *Whistler v. Ruskin*, *Odger's Lib. & Sl.* (2 ed.) 49; *Duplany v. Davis*, 3 T. L. R. 184; *Crane v. Waters*, 10 Fed. Rep. 619; *Snyder v. Fulton*, 34 Md. 128, 137; *Gott v. Pulsifer*, 122 Mass. 235; *O'Connor v. Sill*, 60 Mich. 175; *Cooper v. Stone*, 24 Wend. 434 (*seem*); *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, n. (*seem*); *Press Co. v. Stewart*, 119 Pa. 584 *Accord.* — ED.

<sup>2</sup> The statement of the case, the arguments of counsel, the opinion of MELLOR, J., and portions of the opinion of CROMPTON and BLACKBURN, JJ., are omitted. — ED.



I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. Bovill is obliged to say that, because the writer of this article had a *bona fide* belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty: and that is going further than the law allows.

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honor and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable.<sup>1</sup> But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest.<sup>2</sup>

<sup>1</sup> Hibbs v. Wilkinson, 1 F. & F. 608; Turnbull v. Bird, 2 F. & F. 508; Hunter v. Sharp, 4 F. & F. 983; De Mestre v. Syme, 9 Vict. L. R. (L.) 10; Davis v. Duncan, L. R. 9 C. P. 396; Queen v. Carden, 5 Q. B. D. 1, 8; Crane v. Waters, 10 Fed. Rep. 619; Kinyon v. Palmer, 18 Iowa, 377 *Accord.* — Ed.

<sup>2</sup> Stuart v. Lovell, 2 Stark, 93; Macleod v. Wakley, 3 C. & P. 311; Green v. Chap-

The cases cited do not warrant us in going that length. In *Paris v. Levy*<sup>1</sup> there may have been an honest and well-founded belief that the man who published the handbill which was commented upon could only have had a bad motive in publishing it, and if the jury were of that opinion, the writer who attacked him in the public press would be protected. We cannot go farther than that.

CROMPTON, J. I am of the same opinion.<sup>1</sup> . . . The first question is, whether the article on which this action is brought is a libel or no libel, — not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and *bona fide* write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word "privilege" is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not, there was no privilege.

BLACKBURN, J. I also think that the law governing this case is so clearly settled that we ought not to grant a rule. It is important to bear in mind that the question is, not whether the publication is privileged, but whether it is a libel. The word "privilege" is often used loosely, and in a popular sense, when applied to matters which are not,

man, 4 Bing. N. C. 92; *Parniter v. Coupland*, 6 M. & W. 105; *Whistler v. Ruskin*, Odger's Lib. & Sl. (2d ed.) 49; *Wilson v. Reed*, 2 F. & F. 149; *Morrison v. Belcher*, 3 F. & F. 614; *Hedley v. Barlow*, 4 F. & F. 224; *Risk Allah Bey v. Whitehurst*, 18 L. T. Rep. 615; *Massie v. Toronto Co.*, 11 Ont. 362; *Burt v. Advertiser Co.*, 154 Mass. 238; *Cooper v. Stone*, 24 Wend. 434; *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, n. *Accord*. — Ed.

<sup>1</sup> 2 F. & F. 71.

properly speaking, privileged. But, for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a privileged relation; and the cases of a memorial to the Lord Chancellor or the Home Secretary on the conduct of a justice of the peace, *Harrison v. Bush*, and of a statement to a public functionary, reflecting upon some public officer, *Beatson v. Skene*,<sup>1</sup> rank themselves under that class. In these cases no action lies unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition;<sup>2</sup> and I take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement; *Paris v. Levy*.<sup>3</sup> In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel.

The question of libel or no libel, at least since Fox's Act (32 G. 3, c. 60), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another, — whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr. Bovill asked that a further question should be left to them, viz. whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. *Bona fide* belief in the truth of what is written is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages.

*Rule refused.*

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## MERIVALE v. CARSON.

IN THE COURT OF APPEAL, DECEMBER 1, 2, 1887.

[Reported in *Law Reports*, 20 *Queen's Bench Division*, 275.]

APPEAL by the defendant against the refusal of a divisional court (Mathew and Grantham, JJ.) to allow a new trial of the action, or to enter judgment for the defendant.

<sup>1</sup> 5 H. & N. 838.

<sup>2</sup> But see, *contra*, *Williams v. Spowers*, 8 Vict. L. R. (L.) 82. — ED.

<sup>3</sup> 2 F. & F. 71.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called "The Whip Hand." The defendant was the editor of a theatrical newspaper called "The Stage." Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged in the statement of claim as libellous was as follows: "'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-maker or stable-lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier." The innuendo suggested was that the article implied that the play was of an immoral tendency.

It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury, said: "The question is, first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair temperate criticism, and does not bear that meaning, or is not fairly to be read as having that meaning, then your verdict will be for the defendants. . . . It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice towards the plaintiffs. There is no ground for saying so, and no one has said so. . . . The malice which is necessary in this action is one, which, if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you, you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that, otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

*Cock*, Q. C., and *W. Blake Odgers*, for the defendant.

*Lockwood*, Q. C., and *Boxall*, for the plaintiffs.<sup>1</sup>

LORD ESHER, M. R. This action is brought in respect of an alleged libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That, however, is not very material for us to consider now. The proper question was put to the jury in the present case. Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell v. Spottiswoode*, which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shows why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged. Therefore the second question to be put to the jury is,

<sup>1</sup> The arguments of counsel are omitted. — Ed.

whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in *Campbell v. Spottiswoode*. He says: "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think, because he has a *bona fide* belief that he is publishing what is true, that is any answer to an action for libel." He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel. What is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But, when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: "If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendants." He gives a very wide limit, and, I think, rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all. I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz. that the plaintiffs had written an obscene play; and no fair man could have said that. There was there-

fore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this: It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

BOWEN, L. J. We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel? We have the benefit of the machinery which the law gives — the verdict of a jury — for ascertaining the meaning, and it must now be taken to have been conclusively settled, that the writer of the criticism has imputed to the plaintiffs that the story of their play turns in its main incident upon an adulterous wife, and in such a way as not to lead any one to suppose that the plaintiffs objected to the adultery, but, on the contrary, that they had treated the adultery as a spicy incident in the play, without expressing any opinion as to its morality. It has been admitted by the defendant that the play does not in fact contain any adulterous wife, that there is no incident of adultery in it, and therefore it is not open to the suggestion that the plaintiffs have treated adultery lightly in such a way as to tend to immorality. These are the facts.

What then is the law applicable to them? We must see, first, what is the question which ought to have been left to the jury on this assumption of the meaning of the article, and then whether it was in fact left to them, and whether there was any miscarriage on their part. I take precisely the same view as the Master of the Rolls with regard to the way in which the word "privilege" ought to be used. The present case is not, strictly speaking, one of "privileged occasion." In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys, — the right of publishing a written criticism upon a literary work which is offered to public criticism.

It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes, J., in *Henwood v. Har-*

rison,<sup>1</sup> that learned judge and the majority of the Court of Common Pleas seem to have treated this right as a branch of the general law of privilege, and to have found a justification for the use of the word "privilege" in the subject matter of the criticism, although there is no limit of the number of the persons entitled to make the criticism. With great respect to Willes, J., I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn, J., and Crompton, J., in *Campbell v. Spottiswoode*. But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one. But, among other reasons, why I prefer the view of Blackburn, J., and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell v. Spottiswoode* (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of "fair criticism"? The criticism is to be "fair," that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair," and, although we cannot find in any decided case an exact and rigid definition of the word "fair," this is because the judges have always preferred to leave the question what is "fair" to the jury. The nearest approach, I think, to an exact definition of the word "fair" is contained in the judgment of Lord Tenterden, C. J., in *Macleod v. Wakley*,<sup>2</sup> where he said, "Whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel." It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell v. Spottiswoode* was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told

<sup>1</sup> Law Rep. 7 C. P. 606.

<sup>2</sup> 3 C. & P., at p. 313.



that, if it attacked the private character of the author, it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism, — I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

Applying the law to the present case, we have to see whether the learned judge misdirected the jury, having regard to their finding as to the true construction of the article. Their construction of the words of the article could not have been affected by what he said to them about the meaning of "fair criticism." The alleged libel stated that the story of the plaintiffs' play turned upon adultery. In a case of manifest misdescription such as this the judge is not bound to go into all the minutiae as if the libel had been of a different character, and his summing-up must be read with reference to this fact. I have read through the summing up of Field, J., and, though I do not think that his language was altogether exact, yet what possible harm could it have done having regard to the facts of the case? The jury had to deal with a case of positive misdescription, a question not of opinion, but of fact. Did not that fall clearly beyond the limits of fair criticism? Could this court since the Judicature Act set aside the verdict of the jury, merely because the language of the learned judge was not exactly that which he would have used if he had written his summing-up? Assuming the interpretation the jury put on the meaning of the words to be correct, as we must assume, I entertain no doubt as to the correctness of the remainder of the verdict. And, even if the view of the law as to privilege which I do not adopt were the right view, I do not think it would make any difference in the present case, because, the misrepresentation being clear, the writer having not merely said that the play had an evil tendency, but having imputed to the authors that it was founded on adultery when there is no adultery at all in it, the jury would have inferred, if the question had been left sufficiently to them, that the writer was actuated by a malicious motive; that is to say, by some motive other than that of a pure expression of a critic's real opinion.

*Appeal dismissed.*

## DAVIS AND SONS, DEFENDANTS, AND SHEPSTONE, PLAINTIFF.

IN THE PRIVY COUNCIL, MARCH 5, 1886.

*[Reported in 11 Appeal Cases, 187.]*

THE judgment of their lordships was delivered by

LORD HERSCHELL, L. C.<sup>1</sup> This is an appeal from a judgment of the Supreme Court of the Colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for £500 damages.

The action was brought to recover damages for alleged libels published by the appellants in the "Natal Witness" newspaper in the months of March and May, 1883.

The respondent was, in December, 1882, appointed Resident Commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the respondent whilst in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing, "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnatory. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserved territory who had visited Cetewayo, and, what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail.

On the 16th of May, 1883, the appellants published a further article, relating to the respondent, which commenced as follows:—"Some time ago we stated in these columns that Mr. John Shepstone, whilst

<sup>1</sup> Only the opinion of the court is given. — Ed.

in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made, a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man."

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the plaintiff as British Resident Commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the Governor of Natal, and published in the colony by messengers from Zululand and its king as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the plaintiff in his public capacity published *bona fide* and without malice.

The case came on for trial before Mr. Justice Wragg and a jury on the 4th of September, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their statements had been conveyed to the editor of a newspaper by a letter from the bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the king to the Governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for £500.

Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds; first, that the learned judge misdirected the jury in leaving to them the question of privilege and in not telling them that the occasion was a privileged one. The second ground insisted upon was that the damages were excessive. Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the plaintiff could only succeed on proof of express malice, is not well founded.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.<sup>1</sup>

<sup>1</sup> *Parmiter v. Coupland*, 6 M. & W. 105; *Queen v. Carden*, 5 Q. B. D. 1, 8; *Bryce v. Rusden*, 2 T. L. R. 435; *Duplany v. Davis*, 3 T. L. R. 184; *R. v. Flowers*, 44 J. P. 377, *per* FIELD, J.; *LeFroy v. Burnside*, L. R. 4 Ir. 556, 565, 566; *Broadvest v. Small*, 2 Vict. L. R. 121; *Stewart v. McKinley*, 11 Vict. L. R. 802; *Brown v. McKinley*, 12 Vict. L. R. 240; *Smith v. Tribune Co.*, 4 Biss. 477; *McDonald v. Woodruff*, 2 Dill. 244; *Hallam v. Post Co.*, 55 Fed. Rep. 456; *Jones v. Townsend*, 21 Fla. 431; *Rearick v. Wilcox*, 81 Ill. 77; *Negley v. Farrow*, 62 Md. 158; *Commonwealth v. Clap*, 4 Mass. 163, 169 (*semble*); *Curtis v. Mussey*, 6 Gray, 261; *Burt v. Advertiser Co.*, 154 Mass. 238 (compare *Sillars v. Collier*, 151 Mass. 50); *Foster v. Scripps*, 39 Mich. 376; *Bronson v. Bruce*, 59 Mich. 467; *Bourresseau v. Detroit Co.*, 63 Mich. 425; *Wheaton v. Beecher*, 66 Mich. 307; *Belknap v. Ball*, 83 Mich. 583; *Hay v. Reid*, 85 Mich. 296; *Aldrich v. Press Co.*, 9 Minn. 133 (but see, *contra*, *Marks v. Baker*, 28 Minn. 162); *Smith v. Burrus*, 106 Mo. 94; *State v. Schmitt*, 49 N. J. 579; *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Hamilton v. Eno*, 81 N. Y. 116; *Seely v. Blair*, *Wright* (Oh.) 358, 683; *Post Co. v. Moloney*, (Ohio, 1893) 33 N. E. R. 921; *Barr v. Moore*, 87 Pa. 385; *Brewer v. Weakley*, 2 Overt. 99; *Banner Co. v. State*, 6 Lea, 176; *Sweeney v. Baker*, 13 W. Va. 158; *Spiering v. Andrae*, 45 Wis. 330; *Eviston v. Cramer*, 57 Wis. 570 *Accord*.

\**Neeb v. Hope*, 111 Pa. 145; *Jackson v. Pittsburgh Times*, (Pa., 1893) 25 Atl. R. 613 *Contra*.

See *Palmer v. Concord*, 48 N. H. 211.

In *Burt v. Advertiser Co.*, *supra*, HOLMES, J., said: "But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his

In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in parliament and in courts of justice are privileged, even though they contain defamatory matter affecting the character of individuals.

But in the case of *Purcell v. Sowler* the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor.

The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But in their Lordships' opinion, so far as it erred, it erred in being too favorable to the appellants, and it is not open to any complaint on their part.

The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Sheckell v. Jackson*, 10 Cush. 25, 26."

*Public Men.* — All participants in legal proceedings are legitimate subjects for comment if restricted to their conduct therein. *Rex v. White*, 1 Camp. 359; *Seymour v. Butterworth*, 3 F. & F. 372; *Hedley v. Barlow*, 4 F. & F. 224; *Woodgate v. Rideout*, 4 F. & F. 202; *Hibbins v. Lee*, 4 F. & F. 243; *Risk Allah Bey v. Whitehurst*, 18 L. T. Rep. 615; *Reg. v. Sullivan*, 11 Cox C. C. 44, 57; *Kane v. Mulvaney*, Ir. R. 2 C. L. 402; *Miner v. Detroit Co.*, 49 Mich. 358. See, also, *Kelly v. Tinling*, L. R. 1 Q. B. 699 (*Churchwarden*); *Harle v. Catterall*, 14 L. T. Rep. 801 (*Waywarden*).

*Matters not of Public Interest.* — The right of comment was denied in *Latimer v. Western Co.*, 25 L. T. Rep. 44; *Hogan v. Sutton*, 16 W. R. 126; *Wilson v. Fitch*, 41 Cal. 363.

See also *Hearne v. Stowell*, 12 A. & E. 719; *Gathercole v. Miall*, 15 M. & W. 319; *Walker v. Brogden*, 19 C. B. N. S. 65; *Booth v. Briscoe*, 2 Q. B. Div. 496. — Ed.

of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive or for interfering with the finding of the jury in this respect.

They will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

## SECTION VII.

*Conditional Privilege.*

## (a) PRIVILEGED REPORTS.

## WASON v. WALKER.

IN THE QUEEN'S BENCH, NOVEMBER 25, 1868.

[*Reported in Law Reports, 4 Queen's Bench, 73.*]

THE judgment of the court was delivered by

COCKBURN, C. J.<sup>1</sup> This case was argued a few days since before my Brothers LUSH, HANNEN, and HAYES, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, *dicta* of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *Rex v. Wright*,<sup>2</sup> Lawrence, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> 8 T. R. 293.

unauthorized by the House. Again in *Davison v. Duncan*,<sup>1</sup> Wightman, J., seems disposed to treat the reports of proceedings in parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here again the question before the court had reference to a report, not of a proceeding in parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual had been assailed, and which report the court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in parliament. On the other hand, in *Stockdale v. Hansard*,<sup>2</sup> Littledale, J., and Patteson, J., use language from which it may be safely inferred that they would have deemed the report of a parliamentary debate, if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper, forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extrajudicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex v. Wright*<sup>3</sup> approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. Lord Kenyon, C. J., says, "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application."<sup>4</sup> Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the char-

<sup>1</sup> 7 E. & B. 229.

<sup>2</sup> 9 Ad. & E. 181-186, 212-214.

<sup>3</sup> 8 T. R. 293.

<sup>4</sup> 8 T. R., at p. 296.



acter of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the authority of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either House, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex v. Lord Abingdon*,<sup>1</sup> and *Rex v. Creevey*,<sup>2</sup> in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex v. Wright*<sup>3</sup> is much shaken, not only by the decision in *Rex v. Creevey*,<sup>2</sup> but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Beyond, however, impugning the authority of *Rex v. Wright*,<sup>3</sup> the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect; and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

The case of *Lake v. King*,<sup>4</sup> which was cited in the argument before us, has no application to the present case. There, a petition having been presented to the House of Commons by the defendant, impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the House, and it was held that, the printing and circulating petitions being according to the course and usage of parliament, no action would lie.

The case of *Stockdale v. Hansard*,<sup>5</sup> which was much pressed upon us by the counsel for the defendant, is in like manner beside the question. In that case a report from the inspectors of prisons relative to the jail of Newgate, in which a work published by the plaintiff, a bookseller, and which had been permitted to be introduced into the prison, had been described as "of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the House in conformity with the Act of 5 & 6 Wm. 4, c. 38. In another report, being a reply to a report of the court of aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers, to whom they (the inspectors) had applied for information

<sup>1</sup> 1 Esp. 226.

1 Saund. 131.

<sup>2</sup> 1 M. & S. 273.<sup>5</sup> 9 Ad. & E. 1.<sup>3</sup> 8 T. R. 293.

as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this court had to consider was, first, that the papers in question had been published by order of the House of Commons; secondly, that the House having resolved (as it had done with a view to such an action) that the power of publishing such of its reports, votes, and proceedings, as it should deem necessary, was an essential incident to the functions of parliament, the question became one of privilege, as to which the decision of the House was conclusive, and could not be questioned in a court of law.

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege, — doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature, — Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may

/ incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. "The rule," says Lord Campbell, C. J., in the case of *Taylor v. Hawkins*,<sup>1</sup> "is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice."

It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*,<sup>2</sup> namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison v. Dun-*

<sup>1</sup> 16 Q. B., at p. 321.

<sup>2</sup> 8 T. R. at p. 298.

can<sup>1</sup> Lord Campbell says: "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex v. Wright*,<sup>2</sup> that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed, — where would be our attachment to the constitution under which we live, — if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be sup-

<sup>1</sup> 7 E. & B., at p. 231.

<sup>2</sup> 8 T. R., at p. 298.

pressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state, — no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honor is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

The learned counsel for the plaintiff scarcely ventured as of his own assertion to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from the publishing of the proceedings of courts of justice, but he relied on the *dicta* of Littledale, J., and Patteson, J., in *Stockdale v. Hansard*,<sup>1</sup> and on the opinions of certain noble and learned lords in the course of debates in the House of Lords on bills introduced by Lord Campbell for the purpose of amending the law of libel.<sup>2</sup> There is no doubt that in delivering their opinions in *Stockdale v. Hansard*,<sup>1</sup> the two learned judges referred to denied the necessity and in effect the public advantage of the proceedings in parliament being made

<sup>1</sup> 9 Ad. & E. 1.

<sup>2</sup> In 1843: see Hansard's Parliamentary Debates, 3d series, vol. lxx. pp. 1254-8; and in 1858, see vol. cxlix. pp. 947-82.

public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned judges, not satisfied with demonstrating, as they did, by conclusive arguments, that the House had not the power to order papers of a libellous character and forming no part of the proceedings of the House to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. Lord Denman, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of a Mansfield, while overthrowing by irresistible arguments the positions of the Attorney-General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the houses of parliament, not by denying the policy of giving power to the House to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything. That the Legislature did not concur with the two judges in their view of the policy is manifest from the Act of 3 Vict. c. 9, passed in consequence of the decision in *Stockdale v. Hansard*,<sup>1</sup> the preamble of which statute recites that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament and to the promotion of wise legislation that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either house of parliament as such house of parliament may deem fit or necessary to be published." After which the Act proceeds to provide for the prevention of actions being brought in respect of papers published by order of either house of parliament.

As regards the attempt of Lord Campbell to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment,<sup>2</sup> we think it may be as well accounted for by the apprehension, as to the result of any proceeding at law in which the legality of such publication should come in question, produced in his mind by the language of the judges in *Stockdale v. Hansard*,<sup>1</sup> as

<sup>1</sup> 9 Ad. & E. 1.

<sup>2</sup> See *Hansard's Parliamentary Debates*, 3d series, vol. lxx. p. 1254; and vol. cxlix. p. 947.

by any conviction of the defectiveness of the law. And as regards the opinions of the noble and learned persons in the debates in the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of parliamentary debates, if involving defamatory matter, was contrary to law, and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place. We, before whom this question is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the bar to assist us, must endeavor to ascertain the law as applicable to the case, and, if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of forensic discussion, or the opportunity of a judicial consideration of the subject. And this is the more necessary, as we observe that one of the main grounds insisted on for resisting Lord Campbell's bill was, that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate. We cannot but think that,—had the noble and learned persons referred to foreseen that such an action as the present would be brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the houses of parliament which he knew would, in the ordinary course of things, be reported, charges as a libel the publication of the discussion which he himself has provoked, and which publication he would have hailed with satisfaction if the result of it had been favorable to himself and damaging to the object of his attack,—they would have paused before they assumed that by law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective.

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injus-

tice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*,<sup>1</sup> and *Rex v. Creevey*.<sup>2</sup> At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*,<sup>3</sup> as to such a speech being privi-

<sup>1</sup> 1 Esp. 226.<sup>2</sup> 1 M. & S. 273.<sup>3</sup> 7 E. & B., at p. 233.



leged if *bona fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country — which certainly never will be the case — any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

So much for the great question involved in this case. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the "Times" commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was

privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts, — in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of the alleged misdirection as also on the former point, the ruling at *nisi prius* was right, and that consequently this rule must be discharged. *Rule discharged.*<sup>1</sup>

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#### RYALLS v. LEADER AND OTHERS.

IN THE EXCHEQUER, MAY 26, 1866.

[Reported in *Law Reports*, 1 *Exchequer*, 296.]

DECLARATION on a libel published of the plaintiff by the defendants, in a newspaper called the “Sheffield and Rotherham Independent.”

Plea. Not guilty. Issue thereon.

The libel complained of was contained in a report of an examination of a debtor in custody, held in York Castle, before the registrar of the Leeds Bankruptcy Court, pursuant to the provisions of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 101, 102; and it conveyed an imputation on the solvency of the plaintiff, who had been the debtor's partner. The cause was tried at the last Leeds spring assizes before Keating, J., when, the publication of the defamatory matter having been proved, the learned judge told the jury that “the libel was a privileged communication, and that the defendants were entitled to the verdict if the jury thought that the libel was a fair report of the proceedings before the registrar of the Court of Bankruptcy, and published without malice.” The report contained no original comment on what passed. The jury found a verdict for the defendants.

In Easter Term last, a rule *nisi* was obtained for a new trial on the ground that the learned judge had misdirected the jury in telling them that the libel was privileged, and the defendants entitled to a verdict if the report was fair and published without malice.

<sup>1</sup> *Dillon v. Balfour*, L. R. 20 Ir. 600 *Accord.* — ED.

*Overend*, Q. C., and *Cave*, showed cause.

*Manisty*, Q. C., *T. Jones*, and *J. Gully*, in support of the rule.<sup>1</sup>

POLLOCK, C. B. I am of opinion that my Brother Keating was right in his ruling. The complaint here made is that certain proceedings held by a registrar in bankruptcy in York Castle, and published by the defendant, were libellous on the plaintiff. The defence is, that the alleged libel was contained in a fair, correct, and *bona fide* report of what took place; and if these proceedings were in a public court, and the publication was fair, there is no foundation for this action.<sup>2</sup> The only question then is, whether the registrar's court was under the circumstances a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair *bona fide* statement of proceedings there. The jury found that the publication of this report was *bona fide*, and the verdict, therefore, ought not to be set aside.

BRAMWELL, B. I am of the same opinion. I think that this court was a public court. That is shown from the terms of ss. 101 and 102. And even if it were not so, yet if the officer who holds it chooses to make it public, it would be public for this purpose. Then as to the point made, that nothing ought to be published affecting a third party, even when relevant to the inquiry, I think there is no such restriction. Those who are present hear all the evidence, relevant or irrelevant, and those who are absent, may, as far as I can see, have all that is said reported to them. The doctrine contended for is an entire novelty, because, if sound, every witness might bring an action against the newspaper publisher reporting his evidence, and call upon that publisher to prove all the libellous statements which might be contained in his examination or cross-examination. I do not think that there is any such qualification as that suggested, nor do I concur in the other suggestion made to us, viz., that what is *irrelevant* and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. My opinion is, that when once you establish that a court is a public court, a fair *bona fide* report of all that passes there may be published. Possibly this privilege is applied to courts of

<sup>1</sup> The arguments of counsel and the concurring opinions of MARTIN and CHANNELL, BB., are omitted. — ED.

<sup>2</sup> *Risk Allah Bey v. Whitehurst*, 18 L. T. Rep. 615; *McBee v. Fulton*, 47 Md. 403; *Cowley v. Pulsifer*, 137 Mass. 392; *Hawkins v. Globe Co.*, 10 Mo. Ap. 174; *Boogher v. Knapp*, 97 Mo. 122; *Thompson v. Powning*, 15 Nev. 195; *Edsall v. Brooks*, 17 Abb. Pr. 221; N. Y. Code Civ. Proc., § 1907; *Ackerman v. Jones*, 37 N. Y. Sup'r Ct. 42; *Salisbury v. Union Co.*, 45 Hun. 120; *Cincinnati v. Timberlake Co.*, 10 Ohio St. 548; *Sanders v. Baxter*, 6 Heisk. 369 *Accord*.

So publication of copies from the register of judgments is privileged. *Searles v. Scarlett*, '92, 2 Q. B. 56.

Publication of papers filed in the clerk's office, but not produced in open court, are not privileged. *Cowley v. Pulsifer*, 137 Mass. 392; *Parke v. Detroit Co.*, 72 Mich. 560. — ED.

justice, because needless scandals are usually avoided in them. I am therefore of opinion that this rule should be discharged.

*Rule discharged.*

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USILL v. HALES.

IN THE COMMON PLEAS DIVISION, JANUARY 30, 1878.

[*Reported in 3 Common Pleas Division Reports, 319.*]

LORD COLERIDGE, C. J.<sup>1</sup> I am of opinion that this rule must be discharged.

This was an action against the proprietor of a newspaper for publishing a *bona fide* and fair report of proceedings before a magistrate. Three persons, surveyors, who had been employed by a civil engineer to assist in the construction of a railway in Ireland, hearing that their employer had been paid, and conceiving that the money due to them had been improperly withheld by him, went before a police magistrate in London, and (I must take it for the purpose of my judgment, and do so take it) applied to him for a summons or order under the Masters and Workman's Act. In the result, the magistrate thought that the facts stated by the complainants showed no ground for a summons against the plaintiff under the Act; and therefore in the result it turned out that, in a certain sense, an application had been made to the magistrate with regard to a matter as to which he had no jurisdiction. I say in a certain sense: but it has been long held, and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and that, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction which, if the facts make out the case, undoubtedly he has.

It has been laid down again and again in broad terms that the publication of the proceedings in courts of justice is privileged if the report of such proceedings be fair and honest; and this is so found to be. An attempt however has been made (and Mr. Shortt will allow me to say that, if it were possible to have succeeded, I think his argument would have succeeded, because he has said everything that could be said, and has said it well,) to distinguish this case and take it out of the general proposition, by bringing it within an undoubted qualification which has been grafted upon that general proposition, viz., that the application to the magistrate here was what may be called an *ex parte* or a preliminary proceeding. Now, there is no doubt that, in many cases to which Mr. Shortt has referred, the term "*ex parte* pro-

<sup>1</sup> Only the opinion of LORD COLERIDGE, and that, too, slightly abridged, is given. LOPES, J., concurred. — ED.

ceeding" has been over and over again used by judges of great eminence, sometimes affirmatively to say that an *ex parte* proceeding is not privileged, and sometimes negatively to say, this, being a proceeding not *ex parte*, is privileged; and I do not doubt for my own part that, if this argument had been addressed to a court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day. Speaking frankly, — and it is useless, if a case has made a certain impression upon your mind after you have done the best you can to understand it, to say it has not made that impression, — it seems to me quite plain that in such cases as *Rex v. Fleet*<sup>1</sup> judgments of great judges do lay down the rule that an *ex parte* or preliminary proceeding is not privileged on the ground, good or bad, that it is very hard upon an individual to have a matter stated against him behind his back which he has no means of answering; and that oftentimes an accused person will come to trial, if he be tried, with a heavy weight of prejudice; where the case against him has been reported in the public newspapers, and his own answer, if he has one, from the necessities of the case has not been similarly made known. No doubt there are very strong observations in those cases adopted in *Duncan v. Thwaites*<sup>2</sup> which go very far to maintain that proposition. There is also a *dictum* of one of the greatest authorities in our law, Lord Eldon, than whom few greater lawyers have ever sat in Westminster Hall, who is reported, by Mr. Starkie,<sup>3</sup> to have once observed that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall to learn that the publication of *ex parte* proceedings was legal.

But we are not now living, so to say, within the shadow of those cases: and it is idle to deny that there are cases since that time, in which the decisions I have just now referred to have been brought to the attention of the learned judges, where the courts have been pressed with the authority of those decisions, and have come to conclusions which it is not for me to say are inconsistent, but which I am perfectly unable to reconcile with those earlier cases: and I find what I think is excellent good sense in the judgment of the Court of Queen's Bench in the case of *Wason v. Walter*, which explains how that is. It is a passage which one of the learned counsel read to us, and it is a passage which upon the whole I should desire to adopt and adhere to: "Whatever disadvantages attach to a system of unwritten law, — and of this we are fully sensible, — it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to

<sup>1</sup> 1 B. & A. 379.

<sup>2</sup> 3 B. & C. 556.

<sup>3</sup> Starkie on Libel, 4th ed., p. 191 (9).

comment on the conduct and motives of public men has only in very recent times been recognized." And then the passage goes on, — " Even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what we call *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the honest publication, and innocent of all intention to do injury to the reputation of the party affected." Now, to the general line of argument in that passage, and to the accuracy of the statement in the last sentence I have read, I entirely adhere; and it is familiar that not only are unimportant cases and *ex parte* proceedings published, but a particular class of inquiries which in some of the earlier cases I find actually by name excluded from the privilege, — I mean inquiries before a coroner, — are in cases which may be supposed to interest the public reported in all the newspapers in the kingdom; and yet no one ever heard, at least since I have known Westminster Hall, of an action being brought by a person injuriously affected by such publication, where the report is honest and *bona fide*; and published without intention to injure. That, therefore, seems to introduce this element into the determination of these cases, that there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the courts have from time to time applied as best they may what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them. If there had been a case directly in point in which a proceeding such as this, where the matter was at an end, and where the publication had been found by the jury to have been *bona fide*, honest, and fair, had been held by a court of co-ordinate jurisdiction not to be privileged, I do not hesitate to say for my own part that I should have gladly acted upon it, because I do not disguise that my own judgment is not at all satisfied with the enormous advantage to the public of having every small personal matter reported day by day, often to the extreme pain and injury of individuals, which is supposed to form its justification. Nevertheless, I feel it to be the duty of a judge not to declare what he considers the law ought to be, but to decide according to what to the best of his judgment he finds it is: and, if he finds a principle laid down upon competent authority, it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it.

I come therefore to the consideration of this case feeling that the general tendency of the law has been to hold such a publication as this to be within the protection of the privilege. Now, I do find one case which to the best of my judgment appears to cover this case, and from which I am unable, according to the principle laid down in it, to distinguish the case now before us. It is a case to which much reference has been made, and which Mr. Shortt has dealt with at considerable length, viz. *Lewis v. Levy*;<sup>1</sup> and it has no doubt a most important bearing upon this question. I do not propose to read the elaborate judgment delivered by Lord Campbell in that case: it is well summed up in these words: "The rule, that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge terminating in the discharge by the magistrate of the party charged." I am perfectly aware that there may be subtle distinctions, — distinctions which I will not say are merely shadowy, but which are subtle, — between the facts of that case and those of the case now before us: but I cannot disguise from myself that the *ratio decidendi* and the argument by which the court was there led to hold such proceedings to be privileged, do in effect cover this case. I am of opinion that this is a case in which there was a judicial proceeding terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis v. Levy*<sup>1</sup> from that involved in the present case; and I adopt what is said there<sup>2</sup> of the old, — and I may say great case, because it was decided by judges of high authority, — of *Curry v. Walter*,<sup>3</sup> so far back as the year 1796. That case is adopted by the Court of Queen's Bench in a written judgment in the year 1858, as a ground of their decision; and, whatever may have been said about it in some of the intermediate cases, and the doubts that have been thrown upon it by some eminent judges, it must I think be considered to be completely rehabilitated by the judgment of the Court of Queen's Bench in *Lewis v. Levy*.<sup>1</sup> I am content, therefore, to rest my judgment in this case upon the principles laid down in *Curry v. Walter*<sup>3</sup> and deliberately reaffirmed in *Lewis v. Levy*,<sup>1</sup> and to say that, upon the principles there laid down, I am of opinion that this rule must be discharged.

*Rule discharged.*<sup>4</sup>

<sup>1</sup> E. B. & E. 537.

<sup>2</sup> E. B. & E., at p. 559.

<sup>3</sup> 1 B. & P. 525.

<sup>4</sup> *Curry v. Walter*, 1 Esp. 456, 1 B. & P. 526; *Lewis v. Levy*, E. B. & E. 537; *Kimber v. Press Association*, '93, 1 Q. B. 65; *McBee v. Fulton*, 47 Md. 403; *Salisbury v. Union Co.*, 45 Hun, 120 (*semble*) *Accord*.

See *Duncan v. Thwaites*, 3 B. & C. 556; *Stanley v. Webb*, 4 Sandf. 21; *Matthews v. Beach*, 5 Sandf. 256; *Cincinnati Co. v. Timberlake*, 10 Ohio St. 548.

The report of *ex parte* proceedings may be published before their termination, if of such a character that there will be a final decision. *Kimber v. Press Association*, '93, 1 Q. B. 65. — Ed.

## MILISSICH v. LLOYD'S.

IN THE COURT OF APPEAL, FEBRUARY 9, 10, 1877.

*[Reported in 13 Cox, Criminal Cases, 575.]*

MELLISH, L. J.<sup>1</sup> In this case the defendants have appealed from a decision of the Common Pleas Division, ordering a new trial on the ground that the verdict given for the plaintiff was against the weight of evidence. They are not satisfied with that order, but they come before us to have judgment entered for themselves. The question for us is an important one, as to the power of the court to enter judgment under the Judicature Acts. Now, although the Judicature Acts do undoubtedly give very general powers to the court as to entering of judgment, it is clearly not intended by the Legislature that the court should take advantage of that general rule to remove questions from the consideration of the jury which are questions of fact properly for their consideration. The action was brought by the plaintiff against Lloyd's for an alleged libel published by Lloyd's in a pamphlet. At the trial, no doubt, the defence of privileged communication was raised and Lord Coleridge expressed an opinion that Lloyd's would not have the same privilege as an ordinary newspaper; and he also expressed an opinion that, inasmuch as only the speech of the prosecuting counsel and the summing up of the judge, and not the speech of the counsel for the defence, at the criminal trial, was published, the report could not be a fair one of the trial. I cannot agree with either of these doubts. I cannot think there is any difference between the privilege attaching to a report in a newspaper or in a pamphlet, unless some question of malice is raised. Of course, if actual malice is alleged, the fact that the libel was published in a pamphlet and not in a newspaper might be very material, but when no such allegation is made I cannot conceive there is any difference. I also cannot agree that the mere fact that the publisher did not publish the evidence in full, but only the summing up of the judge and the speech of the prosecuting counsel, made the report of the trial an unfair one. I think that proposition implies that proceedings at trials cannot be reported at all unless they are reported in full. It must, therefore, be sufficient to publish a fair abstract of the evidence. Now, I do not know how the reporter could do better than take the judge's summing up to get that fair abstract, although I do not, of course, lay down as a matter of law that the summing-up of a judge is necessarily a correct summary for the report. I think this report may be fair or it may be unfair; but then, is it a question of fact or law whether the report is fair or unfair? I think that it is a question of fact, and should be left to the jury to determine. Then the argument is that the evidence is all one way and that it is useless sending the case

<sup>1</sup> Only the opinion of MELLISH, L. J., is given. — Ed.



down to a new trial because no jury could reasonably find the other way. In my opinion, the court must be very cautious not to take upon itself the functions of a jury. Notwithstanding the great powers given by the Judicature Acts, it is still, of course, the province of the jury to determine between the credibility of witnesses on either side. Here, however, the question is more what is the inference to be drawn from the facts proved in evidence. The general inference to be drawn from all the facts, as in *Lewis v. Levy*,<sup>1</sup> is for the jury. There the whole proceedings before the magistrates were put in evidence, in order to judge of the fairness of the report. Here a full shorthand note is produced, and, being placed in the hands of the jury, they are to draw the inference, and not the court. Now, although I think that persons might draw very unfair inferences against a man who, like the plaintiff, did not appear at the trial himself and could not defend himself from the charges which were made against him on both sides, still, if the report is a fair one of what took place the defendants will be privileged. The question for the jury will be at the new trial — was the report a fair one, and would it give a fair notion to people who were not there of what took place? That question is one for the jury, and I think the case should, therefore, be sent for a new trial.

*Judgment below affirmed.*<sup>2</sup>

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### STEVENS v. SAMPSON.

IN THE COURT OF APPEAL, NOVEMBER 15, 1879.

[Reported in 5 *Exchequer Division Reports*, 53.]

CLAIM for falsely and maliciously printing and publishing of the plaintiff certain words in certain newspapers. The libel set out in the claim was a report, published by the defendant, of certain proceedings in a plaint of *Nettlefold v. Fulcher*, tried at the Marylebone county court, and brought to recover damages and costs sustained by Nettlefold in setting aside certain proceedings instituted by Fulcher against Nettlefold to recover the possession of certain premises. It alleged that at the county court the defendant in the present action appeared for Nettlefold, and made statements regarding the conduct of the plaintiff in the present action, who was a debt collector and employed by Fulcher as agent to recover possession of the premises.

Statement of defence: That the words alleged to have been published were a true and correct account and report of a certain trial in a court

<sup>1</sup> E. B. & B. 537.

<sup>2</sup> *Macdougall v. Knight*, 14 App. Cas. 194 (explaining s. c. 17 Q. B. Div. 636); *Salisbury v. Union Co.*, 45 Hun, 120 *Accord*.

*See Annaly v. Trade Co.*, L. R. 26 Ir. 394. — Ed.

of justice having jurisdiction in that behalf, and of certain words spoken during the sitting of the court in the course of the trial, and published for the public benefit, and without malice. Issue thereon.

At the trial before Cockburn, C. J., at the Hilary Sittings, 1879, at Westminster, it was proved that the defendant, who was a solicitor, had sent the report set out in the claim of the trial of *Nettlefold v. Fulcher*, before the Judge of the Marylebone county court, to the local newspapers. Cockburn, C. J., left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury answered these questions: 1. That it was in substance a fair report; 2. That it was sent with a certain amount of malice; and found a verdict for the plaintiff with 40s. damages. Cockburn, C. J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong.

LORD COLERIDGE, C. J.<sup>1</sup> The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged, two elements must exist: not only must the occasion create the privilege, but the occasion must be made use of *bona fide* and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for *bona fides* is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding, are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension. *Judgment affirmed.*<sup>2</sup>

<sup>1</sup> The concurring opinions of BRAMWELL and BRETT, L. JJ., and the argument for defendant are omitted. — ED.

<sup>2</sup> *Salmon v. Isaac*, 20 L. T. Rep. 885; *Saunders v. Baxter*, 6 Heisk. 369 *Accord.* — ED.

## PURCELL v. SOWLER AND OTHERS.

IN THE COURT OF APPEAL, FEBRUARY 3, 1877.

[Reported in 2 Common Pleas Division Reports, 215.]

## ACTION for libel.

The libel was contained in a report, published in a Manchester newspaper, by the defendants, the proprietors, of the proceedings at a meeting of the board of guardians for the Altrincham poor-law union, at which *ex parte* charges were made against the plaintiff, the medical officer of the union workhouse at Knutsford, of neglect in not attending the pauper patients when sent for.

At the trial it appeared that the charges were unfounded in fact, but it was admitted that the report was accurate and *bona fide*. A verdict was taken by consent for the plaintiff, with nominal damages and costs, judgment to be entered accordingly, with leave to move to enter judgment for the defendants, if the court should be of opinion that the publication was privileged.

The Common Pleas Division refused the motion, ordering judgment to stand for the plaintiff.<sup>1</sup>

The libel, &c., are set out at length in the report in the court below. The defendants appealed.

*J. Edwards*, Q. C., for the defendants.

*C. Russell*, Q. C., and *Bigham*, for the plaintiff.

MELLISH, L. J.<sup>2</sup> I am of the same opinion. We are asked to extend the law of privilege as to the report of proceedings of a public body to an extent beyond what it has as yet been carried. In Lord Campbell's time it was supposed that the privilege only extended to the proceedings in a court of law. A report of such proceedings has always been held privileged, because all her Majesty's subjects have a right to be present, and there would, therefore, be nothing wrong in putting the rest of the public in the position of those who were actually present. The privilege has been extended to the publication of debates in parliament, and properly extended, as they stand on the same principle as the proceedings in courts of law. There is no doubt this distinction: that as to courts of law the public have a right to be present, but they are only admitted to the debates in either House of Parliament when the House chooses to permit them to be present. The House has a discretion, but when the debates are held in public, it is clear that a newspaper ought not to be held to commit an offence by putting those who were not present in the same position as those who were. It is argued that this privilege ought to be extended as to a variety of other public bodies. I express no decided opinion, and I desire, with the

<sup>1</sup> 1 C. P. D. 781.

<sup>2</sup> The concurring opinions of COCKBURN, C. J., and BAGGALLAY and BRAMWELL, JJ. A., and the arguments of counsel are omitted. — ED.

Lord Chief Justice, to be understood as expressing no opinion; but at the same time I am clearly of opinion, that the privilege ought not to be extended to such a case as the present. A board of guardians have a discretion whether or not they will admit the public to their meetings; and whether they choose to exclude or choose to admit, the public have no right to complain. But I cannot think that the courts of law are to be bound by the mode in which the guardians exercise their discretion in admitting or excluding strangers. Although they admit the public on an occasion when *ex parte* charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had an opportunity of meeting them; and I cannot see any inconvenience in holding that the publication is not privileged; in holding otherwise we should be depriving the individual of his rights without any commensurate advantage. The law on the subject of privilege is clearly defined by the authorities. Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges. If one of the guardians had met a person not a ratepayer or parishioner, and had told him the charge against the plaintiff, surely he would have been liable to an action of slander. I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comments on his conduct might have been justified. But that is a very different thing from publishing *ex parte* statements, which not only are not proved, but turn out to be unfounded in fact. I am, therefore, clearly of opinion that the occasion of the publication was not privileged, and that the judgment for the plaintiff ought to be affirmed.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> See *Charlton v. Watton*, 6 C. & P. 385; *Davison v. Duncan*, 7 E. & B. 229, 233; *Popham v. Pickburn*, 7 H. & N. 891; *Davis v. Duncan*, L. R. 9 C. P. 396; *Allbut v. General Council*, 23 Q. B. D. 400, 411.

By St. 51 & 52 Vict. c. 64, §§ 3 and 4, “§ 3. A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.

“§ 4. A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made

## IRA BARROWS v. LUTHER V. BELL.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1856.

[Reported in 7 Gray, 301.]

SHAW, C. J.<sup>1</sup> The present is an action of tort, brought to recover damage for a publication alleged to be a libel upon the plaintiff, consisting of an article published in the Boston Medical and Surgical Journal, under the direction of the defendant.

The article alleged to be libellous is headed, "The suits against the Massachusetts Medical Society," and it proceeds to give a brief account of the proceedings of the medical society, which resulted in the expulsion of the plaintiff from his membership, for misconduct.

Whatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in this country and in this Commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Commonwealth v. Clapp*,<sup>2</sup> and many other cases.

The Massachusetts Medical Society were not a private association; they were a public corporation, chartered by one of the earliest Acts under the Constitution, which was amended and their powers confirmed by several subsequent Acts. Sts. 1781, c. 15; 1788, c. 49; 1802, c. 123; 1818, c. 113.

maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

"For the purposes of this section 'public meeting' shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted." *Kelly v. O'Malley*, 6 T. L. R. 62, was decided under this statute. — Ed.

<sup>1</sup> The case has been materially abridged. — Ed.

<sup>2</sup> 4 Mass. 163.

The charter invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified. They were authorized to elect fellows, and vested with power to suspend, expel or disfranchise any fellow or member, and to make rules and by-laws for their government. No person could be a member, but by his own act in accepting the appointment.

This society was regarded by these legislative Acts as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people. The plaintiff, by accepting his appointment as a fellow, voluntarily submitted himself to the government and jurisdiction of the society in his professional relations, so long as they acted within the scope of their authority.

The *status* or condition of being a member of this society was one of a permanent character and recognized by law — one in which each member has a valuable interest; and that it was so regarded by the plaintiff is manifest from his effort to obtain a restoration to it by a judgment of this court, by a writ of mandamus.

We think it obvious that the subject-matter of the complaint — dishonorable conduct, a fraudulent transaction between the plaintiff and another member of the profession and of the same society — was within the scope of the authority conferred by law on the society; and that the direction of the court, that their action was conclusive upon the plaintiff, was correct. As to the legal proceedings set forth in the supposed libel, it was admitted by the plaintiff's counsel that the account there given of those proceedings was substantially true.

If then this charge of dishonorable or fraudulent conduct by the plaintiff, in his dealings with Dr. Carpenter, was within the jurisdiction of the medical society, and proceedings were instituted and carried on to their final determination in the expulsion of the plaintiff from his fellowship, then the proceedings might be rightly characterized, as in the case of *Farnsworth v. Storrs*, as *quasi* judicial; and then the only remaining question of fact was, whether the publication was a true and correct narrative of such proceedings and determination. This question the judge did leave, or proposed to leave, to the jury; with the direction, that if they should find upon the evidence that that part of the publication was true, the defendant would be entitled to a verdict. We are of opinion that this direction was right. As the verdict was for the defendant, we are to assume that it was found by them; or, if the verdict was taken by consent, it would have been found under the instruction that the publication did present a true and correct narrative of the proceedings before the society, and their determination thereon.

The fact, that these proceedings were considered closed and finished, takes away from this publication the objection, that it would have a ten-

dency to prejudice the public mind and prevent the party affected from having a fair trial. *Judgment on the verdict for the defendant.*<sup>1</sup>

# BARNES v. CAMPBELL AND ANOTHER.

IN THE SUPREME COURT, NEW HAMPSHIRE, JUNE, 1879.

[Reported in 59 *New Hampshire Reports*, 128.]

CASE, for libel in accusing the plaintiff of crime. Plea, the general issue, with a brief statement alleging that the defendants are conductors and publishers of a newspaper published at, &c., and as such it was part of their duty to give to their readers such items of news as they might properly judge to be of interest and value to the community, and that, as such conductors and publishers, they published the article complained of, in good faith, without malice, believing and having good reason to believe the same to be true.

Motion by the plaintiff to reject the brief statement.

*Sulloway* and *Topliff*, for the plaintiff.

*C. R. Morrison* and *Osgood*, for the defendants.

SMITH, J. Matter in justification must be pleaded. But according to some decisions, matter in excuse may be given in evidence under the general issue, or be pleaded. *State v. Burnham*,<sup>2</sup> and authorities cited; *Carpenter v. Bailey*.<sup>3</sup> In this view of the case, it is, perhaps, immaterial whether or not the brief statement is defective. But, treating the brief statement and the motion to reject it as intended to raise the question whether the brief statement sets forth a defence, we are of opinion that it does not. The defendants probably intended to set out the excuse of a lawful occasion, good faith, proper purpose, and belief and probable cause to believe that the publication was true. They laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt, as a privileged class, from the consequences of damage done by their false news. Their communications are not privileged merely because made in a public journal. They have the same right to give information that others have, and no more. *Smart v. Blanchard*,<sup>4</sup> *Palmer v. Concord*,<sup>5</sup> *Sheckell v. Jackson*.<sup>6</sup> The occasion of the defendants' publishing a false charge of crime against the plaintiff was not lawful, if the end to be attained was not to give useful information to the community of a fact of which the community had a right to be and ought to be informed, in order that they might act upon such information. *State v. Burnham*,<sup>7</sup> *Palmer v.*

<sup>1</sup> *Allbutt v. General Council*, 23 Q. B. Div. 400 *Accord.*

<sup>2</sup> 9 N. H. 34, 43.

<sup>4</sup> 42 N. H. 137, 151.

<sup>6</sup> 10 Cush. 25.

<sup>3</sup> 53 N. H. 590.

<sup>5</sup> 48 N. H. 211, 216.

<sup>7</sup> 9 N. H. 34, 41, 42.

Concord,<sup>1</sup> *Carpenter v. Bailey*.<sup>2</sup> The defendants do not state facts that would constitute a lawful occasion. They make a loose averment of their general duty to give their readers such news as they (the defendants) might properly judge to be of interest and value to the community. This should be struck out of the record as insufficient and misleading. It is, in effect, an intimation that they published the libel in the usual course of their business, and is calculated to give the jury the erroneous impression that the defendants' judgment of the propriety of the publication is evidence of the lawfulness of the occasion. The defendants' general business of publishing interesting and valuable news was not, of itself, a lawful occasion for publishing this particular, false, and criminal charge against the plaintiff. It will be for the jury to say what weight the defendants' business has as evidence on the question of malice. But however high the defendants' vocation, and however interesting and valuable the truth which they undertake to give their readers, their ordinary and habitual calling is no excuse for assailing the plaintiff's character with this false charge of crime. They must show specific facts constituting a lawful occasion in this particular instance, as if this false charge had been the only thing they ever published. They allege nothing of that kind. They do not state that the community had any interest which would have been protected or promoted by the publication complained of if it had been true, or had a right to be or ought to be informed of the subject-matter of it in order that they might act upon correct information of it, or that the information given would have been practically useful to anybody if it had been true. This is the substance of a lawful occasion. The brief statement contains no specification on this point.

*Motion granted.*

<sup>1</sup> 48 N. H. 211, 217.

<sup>2</sup> 53 N. H. 590; s. c. 56 N. H. 283.



SECTION VII. (*continued.*)

(b) COMMUNICATIONS IN THE COMMON INTEREST OF THE MAKER AND RECEIVER,  
OR IN THE INTEREST OF THE MAKER ALONE.

## BLACKHAM v. PUGH.

IN THE COMMON PLEAS, JANUARY 31, 1836.

[*Reported in 2 Common Bench Reports, 611.*]

TINDAL, C. J.<sup>1</sup> This was an action upon the case for a libel upon the plaintiff in the way of his trade.

The declaration stated that the plaintiff had sold his stock in trade by auction, and that the proceeds were then in the hands of his auctioneers; and that he, the plaintiff, had purchased of the defendant certain goods to the amount of £62 and upwards, upon a credit which had not then expired; and that the defendant falsely and maliciously published the libel complained of, in the form of a notice, which he procured his attorneys to send to his said auctioneers; by which notice they were desired not to part with the proceeds of the sale in their hands, *the plaintiff having committed an act of bankruptcy.*

Upon the general issue, the jury returned a verdict for the plaintiff, by the direction of the learned judge, who told the jury this was not a case in which the defendant was justified under the general issue, although he made the communication *bona fide*, and believing it to be true at the time. And whether this direction of the learned judge was right or not, is the question raised for our consideration, on a motion for a new trial.

This action, it is to be observed, is not an action against the defendant for maliciously, and without any reasonable or probable cause, directing his attorneys to give the notice to the auctioneers; under which form of action, the defendant would have been held liable in damages to the plaintiff, if, without any reasonable cause, but from over-precipitation, or unfounded suspicion, he had caused such notice to be given. But this is an action for a false and malicious *libel*. And the question is, whether such action is maintainable where there is altogether the absence of any malice in fact, and where the defendant, having a personal interest in preventing the money from being paid over to the plaintiff, did, with perfect good faith, and in the full belief that the plaintiff had committed an act of bankruptcy, direct his attorneys to give such notice to the auctioneers.

If the defendant had issued a fiat in bankruptcy against the plaintiff,

<sup>1</sup> Only the opinion of the Chief Justice is given. COLTMAN and ERLE, JJ., concurred. CRESSWELL, J., dissented. — ED.

in pursuance of his notice,<sup>1</sup> it is perfectly clear that the plaintiff could not have sued him in an action of slander or for a libel, but must have brought his action for maliciously, and without any reasonable or probable cause, issuing the fiat. And it does seem singular that a previous notice,<sup>2</sup> which was absolutely necessary to protect the interest of the creditors of the plaintiff under such fiat, should be supposed to fall under a different construction of law from the issuing of the fiat itself. It does, indeed, seem to be part and parcel of the same transaction.<sup>3</sup>

But, in any point of view, this case appears to me to fall within the range of that principle by which a communication made, by a person immediately concerned in interest, in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel. *Delaney v. Jones*, *M'Dougall v. Claridge*,<sup>4</sup> and *Toogood v. Spyring*, appear to me to be authorities which fully support this proposition. In the last of these cases, the judgment includes — under those cases in which the law considers the occasion to prevent the inference of malice which it draws from unauthorized communications injurious to the character of another, — such communications as are fairly and honestly made “by a person in the conduct of his own affairs, in matters where his interest is concerned.”

It appears to me that the present case falls strictly within the principle so laid down, in the soundness and propriety of which principle I entirely agree; and, consequently, that the direction of the learned judge was incorrect, and that the rule should be made absolute.<sup>5</sup>

<sup>1</sup> The notice under the statute.

<sup>2</sup> The alleged libel.

<sup>3</sup> *Secus*, where no fiat.

<sup>4</sup> 1 Camp. 267.

<sup>5</sup> *Delaney v. Jones*, 4 Esp. 191 (but see *Lay v. Lawson*, 4 A. & E. 798); *Fairman v. Ives*, 5 B. & Al. 642; *Coward v. Wellington*, 7 C. & P. 531; *Tuson v. Evans*, 12 A. & E. 733 (*semble*); *Wenman v. Ash*, 13 C. B. 836 (*semble*, communication to unsuitable person); *Manby v. Witt*, 18 C. B. 544; *Taylor v. Hawkins*, 16 Q. B. 308; *Amann v. Damm*, 8 C. B. N. S. 597; *Force v. Warren*, 15 C. B. N. S. 806; *Oddy v. Paulet*, 4 F. & F. 1009 (*semble*); *Cooke v. Wildes*, 5 E. & B. 328; *Regina v. Perry*, 15 Cox C. C. 169; *Bank v. Strong*, 1 App. Cas. 307; *Hunt v. Great Co.*, '91, 2 Q. B. 189; *Hobbs v. Bryers*, L. R. 2 Ir. 496; *Lang v. Gilbert*, 4 All. (N. B.) 445; *Gasley v. Moss*, 9 Ala. 266; *Beeler v. Jackson*, 64 Md. 589; *Brow v. Hathaway*, 13 All. 239; *Bacon v. Mich. Co.*, 66 Mich. 166; *Lovell Co. v. Houghton*, 116 N. Y. 520; *Behee v. Mo. Co.*, 71 Tex. 424; *Mo. Co. v. Richmond*, 73 Tex. 568; *Mo. Co. v. Behee*, (Tex. 1893) 21 S. W. R. 384 *Accord.* — ED.

## LAWLESS v. THE ANGLO-EGYPTIAN COTTON CO.

IN THE QUEEN'S BENCH, FEBRUARY 11, 1869.

[Reported in *Law Reports*, 4 *Queen's Bench*, 262.]

**LIBEL.** The declaration charged that the defendants falsely and maliciously published of the plaintiff, their manager, in a certain report of the affairs of the company, these words: "The shareholders will observe that there is a charge of £1,306 1s. 7*d.* for deficiency of stock, which the manager is responsible for; his accounts as such manager in the company have been badly kept, and have been rendered to us very irregularly."

Plea: Not guilty. Issue thereon.<sup>1</sup>

It was objected on behalf of the defendants that there was no evidence of a publication of the libel, and that it was a privileged communication. The Chief Baron overruled the objections, but reserved leave to the defendants to move to enter a nonsuit on both points. The plaintiff having proved his special damage, the jury found a verdict for £500.

A rule having been obtained to enter a nonsuit pursuant to the leave reserved,

*Holker*, Q. C., and *Gorst*, showed cause.

*Manisty*, Q. C. (*R. C. Fisher* with him), in support of the rule.

**MELLOR, J.** I am of opinion that the rule should be made absolute to enter a nonsuit. Had I been able to perceive that any substantial injustice might have been done by not leaving any question to the jury, I should have been disposed to send the case down for a new trial. But I think there was no evidence of express malice which ought to have been left to the jury.

As I understand the facts of the case, the plaintiff was employed as the agent of the defendants in Egypt, and his transactions were necessarily brought under the notice of the auditors, who are appointed by Act of Parliament, or at all events by the articles of association of the company, and who are fit persons to investigate the accounts of the company. The auditors considered that a deficiency in the stock of the company was owing in some sense to the plaintiff's default, and they expressed that opinion in their report. It seems they did this after having received such explanations as Mr. Bell could offer, but it must be observed that those explanations were offered to the auditors and not to the directors. What the directors did was this, in their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors. There is nothing whatever to

<sup>1</sup> The statement has been condensed, the facts sufficiently appearing in the opinion of MELLOR, J. The arguments of counsel and the concurring opinion of HANSEN, J., are omitted. — ED.

show that the directors had any reason to doubt the truth of that statement, and there was no evidence of any act on their part from which malice could be inferred, and therefore I think the Chief Baron was right in not putting the question of malice to the jury. As to the question of intrinsic or extrinsic evidence, the report was one which the directors were fully warranted in believing was correct; and there is nothing to show that the directors acted otherwise than *bona fide* in communicating it to the shareholders. No doubt the directors are to make their report to a meeting of the shareholders, to be called for that purpose, and it is clear that those who are absent are bound by the acts of those who are present, but the absent shareholders are interested in the prosperity or adversity of the company, and in knowing all the circumstances upon which the welfare of the company depends. It seems to me, therefore, that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous.

This case does not fall within the rule in *Cooke v. Wildes*.<sup>1</sup> There the question of malice was properly left to the jury, because the letter contained defamatory expressions which were unnecessary; the defendant was not content with stating the facts that he had heard, but he made a calumnious observation of his own and put a gloss on the plaintiff's conduct which was libellous. There was therefore intrinsic evidence of malice, and that the defendant had not acted *bona fide*, and these questions were properly left to the jury. I think we are bound by the cases of *Somerville v. Hawkins* and *Taylor v. Hawkins*.<sup>2</sup> The principle there laid down is, that where there is no evidence of malice the judge ought not to leave any question to the jury. Here I think the conduct of the directors negatives malice on their part, and it is clear that they acted *bona fide*. I think we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged. I also think that it was the duty of the directors to communicate the report not only to the shareholders present at the meeting, but to all the shareholders, and that they had an interest in receiving it. I am glad that Mr. Holker called our attention to the American authority, for it supports the judgment of the court. In *Philadelphia, Wilmington, and Baltimore Railroad Company v. Quigley*<sup>3</sup> it was held that it was within the course of business and employment of the president and directors for them to investigate the conduct of their officers and agents, and to report the result to the stockholders. It was also held, in the absence of malice and bad faith, that the report to the shareholders was privileged; therefore, to this extent, that case appears to me to be an express authority. But, independ-

<sup>1</sup> 5 E. & B. 328; 24 L. J. Q. B. 367.

<sup>2</sup> 16 Q. B. 308; 20 L. J. Q. B. 313.

<sup>3</sup> 21 Howard (Rep. Sup. Court, U. S.), 202.

ently of any authority, I am quite prepared to hold that a company, having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders, whether present or absent, if the communication be made without malice and *bona fide*. The communication in this case is *prima facie* privileged, and there being no evidence intrinsic or extrinsic of malice, that question was very properly not left to the jury. I think the conclusion at which the Chief Baron arrived at *nisi prius* without hearing any argument erroneous, and with great deference to that eminent and learned judge, I am of opinion this rule to enter a nonsuit should be made absolute.

*Rule absolute.*<sup>1</sup>

## HANNAH WILSON PADMORE v. LAWRENCE.

IN THE QUEEN'S BENCH, JANUARY 18, 1840.

[Reported in 11 *Adolphus & Ellis*, 380.]

CASE for slander. The words charged to have been spoken by the defendant imputed that the plaintiff had stolen a brooch belonging to the defendant's wife; and they were said to have been uttered in a discourse, &c., and in the hearing of one Jane Cole and divers &c.

Pleas. 1. Not guilty. 2. A traverse of part of the inducement not material here.

<sup>1</sup> Barbaud v. Hookham, 5 Esp. 109; McDougall v. Claridge, 1 Camp. 267; Dunman v. Bigg, 1 Camp. 269 n.; Todd v. Hawkins, 2 M. & R. 20, 8 C. & P. 88; Shipley v. Todhunter, 7 C. & P. 680; Harris v. Thompson, 13 C. B. 333; Maitland v. Bramwell, 2 F. & F. 623; Scarll v. Dixon, 4 F. & F. 250; Cooke v. Wildes, 5 E. & B. 323; Croft v. Stevens, 7 H. & N. 570; Whitely v. Adams, 15 C. B. N. S. 392; Spill v. Maule, L. R. 4 Ex. 232; Laughton v. Bishop, L. R. 4 P. C. 495; Davies v. Snead, L. R. 5 Q. B. 608; Waller v. Lock, 7 Q. B. D. 619; Cowles v. Potts, 34 L. J. Q. B. 247; Quartz Co. v. Beall, 20 Ch. Div. 501; Royal Aquarium v. Parkinson, '92, 1 Q. B. 431; Pittard v. Oliver, '92, 1 Q. B. 474; Phila. Co. v. Quigley, 21 How. 202; Broughton v. McGraw, 39 F. R. 672; Haight v. Cornell, 15 Conn. 74; Etchison v. Pergerson, (Ga. 1892) 15 S. E. R. 680; Wharton v. Wright, 30 Ill. Ap. 343; Coombs v. Rose, 8 Blackf. 155; Kirkpatrick v. Eagle Lodge, 26 Kans. 384; Lynch v. Febiger, 39 La. An. 336; Remington v. Congdon, 2 Pick. 310; Bradley v. Heath, 12 Pick. 163; Farnsworth v. Storrs, 5 Cush. 412; York v. Pease, 2 Gray, 282; Gassett v. Gilbert, 6 Gray, 94; Shurtleff v. Parker, 180 Mass. 293 (*semble*); Landis v. Campbell, 79 Mo. 439; Rothholz v. Dunkle, 53 N. J. 438; Jarvis v. Hathaway, 3 Johns. 180; O'Donoghue v. McGovern, 23 Wend. 26; Streety v. Wood, 15 Barb. 105; Fowles v. Bowen, 30 N. Y. 20; Klink v. Colby, 46 N. Y. 427; McKnight v. Hasbrouck, 17 R. I. 70; Tillinghast v. McLeod, 17 R. I. 208; Holt v. Parsons, 23 Tex. 9; Shurtleff v. Stevens, 51 Vt. 501 (*semble*) *Accord*.

See also Dickeson v. Hilliard, L. R. 9 Ex. 79; Lyman v. Gowing, L. R. 6 Ir. 259, where the communication was made to unsuitable persons. — Ed.

On the trial before Parke, B., at the Hampshire summer assizes, 1838, it appeared that the plaintiff had called at the defendant's house, and that soon afterwards the brooch was missed; that defendant then went to an inn, where the plaintiff was, and stated to her his suspicions, in the presence of a third person; and that the plaintiff, with her own concurrence, was afterwards searched by Jane Cole and another female, who were called in for the purpose, and to whom the defendant at the time repeated the charge. The brooch was not found on the plaintiff, but was afterwards discovered to have been left by the defendant's wife at another place. The defendant's counsel first applied for a nonsuit, which the learned judge refused. The defendant's counsel then, in his address to the jury, contended that the words were spoken without malice, under circumstances which privileged them. The learned judge told the jury that the verdict must be for the plaintiff, if they thought that the words imputed felony, for that it was clear they were not privileged. Verdict for the plaintiff.

In Michaelmas term, 1838, Erle obtained a rule for a new trial, on the ground of misdirection.

*Crowder and Butt* now showed cause.

*Erle and Barstow*, contra.<sup>1</sup>

LORD DENMAN, C. J. The question ought to have gone to the jury, whether this charge was made *bona fide*. Unless *Toogood v. Spyring* is to be overruled, it is clear that the judge was not warranted in withdrawing that question from their consideration.

LITLEDALE, J. The jury were to say whether the defendant believed that the brooch was stolen by the plaintiff, and for that reason charged her with having stolen it, and whether his language was stronger than necessary, or whether the charge was made before more persons than was necessary. The law has been laid down so over and over again.

COLERIDGE, J. For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime. Then had not the defendant a right to make out that case? The facts were for the jury. It is argued that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must not I say why I do so? Supposing it unjustifiable to search a person against his will, here the plaintiff agreed to be searched. The presence of other parties would not do away with the privilege. When the two females were desired to make the search, were they not to be told for what they were to look? The question was clearly for the jury.

*Rule absolute.*<sup>2</sup>

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> *Johnson v. Evans*, 3 Esp. 32; *Fowler v. Homer*, 3 Camp. 294; *Jones v. Thomas*, 34 W. R. 104; *Lightbody v. Gordon*, 9 Scotch Sess. Cas. (4th series) 934; *Dale v. Harris*, 109 Mass. 193 *Accord*.

See to the same effect *Cristman v. Cristman*, 36 Ill. App. 567; *Harper v. Harper*,

## THOMAS SUNDERLAND HARRISON v. EDWIN BUSH.

IN THE QUEEN'S BENCH, TRINITY TERM, 1855.

*[Reported in 5 Ellis & Blackburn, 344.]*

LORD CAMPBELL, C. J., in this term (May 24th), delivered the judgment of the court.<sup>1</sup>

This was an action for a libel, tried before my Brother Crowder at the last Salisbury assizes. The defendant pleaded not guilty, and a justification.

It appeared that Dr. Harrison, the plaintiff, before and at the time when the cause of action accrued, was a justice of peace for the county of Somerset, and was in the habit of acting at petty sessions held in the borough of Frome. In the month of October last, there was a contested election, for a member to represent this borough in Parliament. During the election, there was much excitement; many windows were broken by the mob; and there were dangerous riots in the streets. The defendant was an elector and an inhabitant of the borough; and, after the election was over, he and several hundred other inhabitants of the borough prepared, signed and transmitted to Viscount Palmerston a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly inciting to a breach of the peace; that, after reading the Riot Act, he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in her Majesty's commission of the peace, and concluded thus: "Your memorialists therefore earnestly pray that your Lordship will cause such an inquiry to be made into the conduct of the said Dr. Harrison as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to her Majesty that the said Dr. Harrison be removed from the commission of the peace."

The memorial being produced, and evidence given that it was signed by the defendant and transmitted by him to the office of the Secretary of State, the plaintiff appeared as a witness for himself, and denied the truth of the criminatory allegations in the memorial. He was followed by other witnesses to the same effect. At the close of the plaintiff's case, the defendant's counsel applied for a nonsuit, which the learned

10 Bush, 447; Carnes v. Whitaker, 123 Mass. 342; Lally v. Emery, 59 Hun, 237. Compare Hooper v. Truscott, 2 B. N. C. 457; Harrison v. Fraser, 29 W. R. 652. — Ed.

<sup>1</sup> Only the opinion of the court is given. — Ed.

judge (we think very properly) refused to direct. Assuming that the occasion of presenting the memorial *prima facie* repelled the inference of malice arising from criminatory matter which the memorial contained, that this comes within the category of privileged communications, and that, in the absence of all evidence to prove express malice, the judge would have been justified in directing a nonsuit, evidence had been given that, to the knowledge of the defendant, allegations contained in the memorial were false. Here was evidence of express malice; and a question of fact had arisen for the decision of the jury, whether the defendant in presenting the memorial had acted *bona fide* or maliciously.

The trial proceeded; and a great number of witnesses were called for the double purpose of proving the justification, or at all events of satisfying the jury that the defendant had acted *bona fide*. Some part of the libel was left uncovered by the justification.

The learned judge said that, on the authority of *Blagg v. Sturt*,<sup>1</sup> he should rule that the memorial to the Secretary of State was not a privileged communication, but would reserve leave to the defendant to move to enter a verdict for him, if the jury found *bona fides*. On this point, he desired them to consider "whether the memorial was got up and signed by defendant honestly for the purpose which is stated in it, or whether the defendant had any by-motive? If they found *bona fides* or not, they would assess damages; but these would vary as they thought defendant was actuated more or less by any malicious feeling. If he acted altogether *bona fide*, damages would be very considerably modified." The jury found a verdict for the plaintiff, damages 20s., saying: "We consider it a *bona fide* memorial."

A rule has been obtained to enter a verdict for the defendant; and this, we think, ought to be made absolute.

During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rests. "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." In the present case, little need be said to show that the communicator had both an *interest* and a *duty* in the subject-matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an *interest* that they may not longer remain subject

<sup>1</sup> 10 Q. B. 899.



to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offence; and it was the *duty* of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished. "Duty," in the proposed canon, cannot be confined to legal duties which may be enforced by indictment action, or mandamus, but must include moral and social duties of imperfect obligation. One mode of proceeding for this offence would have been by applying to us for a criminal information, and seeking to have the offender punished by fine and imprisonment. But another, which, though milder, may be more effectual, is to try by lawful and constitutional means to have the offender removed from his office, without calling down upon him the sentence of a criminal court. In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it.

But it was hardly contended that this memorial would not have been a privileged communication if it had been addressed to a public functionary possessing the direct power of removing a magistrate from the commission of the peace. The great stress of the argument for the plaintiff has been, that the defendant and his co-memorialists mistook their course; that they ought to have addressed the memorial to the Keeper of the Great Seal; and that, by addressing it, although with good faith and according to the advice they received from the Under-secretary of State, to Lord Palmerston, who could not *proprio vigore* dismiss a magistrate from the commission of the peace, they are liable to this action, and might be convicted as libellers.

We think that we are not called upon at present to decide how far an honest mistake in seeking redress subjects a person to civil or criminal responsibility: and we give no opinion on the question whether action or indictment could be maintained against individuals living under the jurisdiction of a county court judge in the county palatine of Lancaster, who should *bona fide* present a criminatory memorial against him to the Lord High Chancellor, praying for his removal, instead of presenting it to the Chancellor of the Duchy of Lancaster, in whom, and in whom alone, the power of removing him is vested;<sup>1</sup> or how it would be if a gentleman, asked by letter for the character of a servant, should *bona fide* write an answer stating acts of dishonesty and immorality committed by the servant, and by mistake address it to another person different from the inquirer, although of the same name.

After great deliberation which we have bestowed upon the subject out of respect for the authority of *Blagg v. Sturt*,<sup>2</sup> we are of opinion that the defendant fell into no mistake whatever in the course which he adopted,

<sup>1</sup> Stat. 9 & 10 Vict. c. 95, s. 18. See *Ex parte Ramshay*, 18 Q. B. 173.

<sup>2</sup> 10 Q. B. 899.

and that, although he might have addressed the memorial to the Lord Chancellor, in which case it certainly would have been privileged, it is equally privileged being addressed to the Secretary of State.<sup>1</sup>

*Rule absolute.*<sup>2</sup>

## PROCTOR v. WEBSTER.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 21, 1885.

[*Reported in Law Reports, 16 Queen's Bench Division, 112.*]

MOTION to enter judgment for the defendant on the ground that the libel for which the action was brought was published on a privileged occasion.

At the trial before Denman, J., at the Nottingham Winter Assizes, 1885, it appeared that the plaintiff was sanitary inspector of the borough of Newark under the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, s. 42, and the libel was contained in a letter written by the defendant and addressed to "The Lords of Her Majesty's Most Honorable Privy Council." This letter charged the plaintiff with irregularities in the exercise of his office, and with taking a bribe from the owner of sheep which had been condemned as diseased.

It was objected that the occasion upon which the libel was published made it absolutely privileged, but the learned judge admitted evidence of express malice and left the case to the jury, who found a verdict for the plaintiff, damages £350.

*J. H. Etherington Smith*, for the defendant.<sup>3</sup>

*R. Harris*, for the plaintiff, was not heard.

POLLOCK, B. I am of opinion that there was no misdirection. The question of law which has been raised is one of some interest, now that

<sup>1</sup> The rest of the opinion, relating to the nature of the office of Secretary of State, is omitted. — Ed.

<sup>2</sup> *Blake v. Pilfold*, 1 M. & Rob. 195; *Woodward v. Lander*, 6 C. & P. 248; *James v. Boston*, 2 C. & K. 4; *Spackman v. Gibney*, Odgers, Lib. & Sl. (2d ed.) 226; *Beatson v. Skene*, 5 H. & N. 838; *Hart v. Von Gumpach*, L. R. 4 P. C. 439; *Stanton v. Andrews*, 5 Up. Can. Q. B. O. S. 211; *Corbett v. Jackson*, 1 Up. Can. Q. B. 128; *Rogers v. Spalding*, 1 Up. Can. Q. B. 258; *McIntyre v. McBean*, 13 Up. Can. Q. B. 534; *Bell v. Parke*, 10 Ir. C. L. R. 279 (*semble*); *White v. Nichols*, 3 How. 266; *Vogel v. Gruaz*, 110 U. S. 311; *Pearce v. Brower*, 72 Ga. 243; *Young v. Richardson*, 4 Ill. Ap. 364; *Rainbow v. Benson*, 71 Iowa, 301; *Bodwell v. Osgood*, 3 Pick. 379; *Wieman v. Mabey*, 45 Mich. 484; *Greenwood v. Cobbey*, 26 Neb. 449; *State v. Burnham*, 9 N. H. 34; *Thorn v. Blanchard*, 5 Johns. 508; *Vanderzee v. McGregor*, 12 Wend. 545; *Howard v. Thompson*, 21 Wend. 319; *Halsted v. Nelson*, 24 Wend. 395; *Decker v. Gaylord*, 35 Hun, 584; *Woods v. Wiman*, 122 N. Y. 445, 47 Hun, 362; *Cook v. Hill*, 3 Sandf. 341; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Harwood v. Keech*, 6 Th. & C. 665; *Gray v. Pentland*, 2 S. & R. 23; *Kent v. Bongartz*, 15 R. I. 72; *Reid v. Delorme*, 2 Brev. 76; *Harris v. Huntington*, 2 Tyler, 129 *Accord*. — Ed.

<sup>3</sup> The argument for the defendant is omitted. — Ed.

so many public officers are liable to be removed by the Privy Council under the powers which that important body possesses, not only by the common law, but by numerous Acts of Parliament. The Privy Council might no doubt have directed an inquiry into the conduct of the defendant, an inquiry which would have been in the nature of a judicial proceeding, and it is argued that a complaint made to them is absolutely privileged even when there is proof of express malice, in the same manner as a statement made during proceedings in one of the regular Courts of Justice. It is unnecessary to inquire into the nature of the functions which the Privy Council exercise under 41 & 42 Vict. c. 74, s. 42, and how far their powers under this Act differ from those of the ordinary constitutional body, for it cannot be pretended that on the present occasion they were exercising judicial functions.

In *Lake v. King*<sup>1</sup> the libel was addressed to a committee appointed by the House of Commons to hold an inquiry and take evidence, and this committee exercised judicial duties in the same manner as the ordinary parliamentary committees. In *Hare and Meller's Case*<sup>2</sup> the proceeding was also judicial, for the jurisdiction of the Court of Chancery was then not so clearly defined as it is now, and all petitions for relief in equity were addressed to the sovereign generally. Apart from judicial proceedings there is a class of cases where complaints have been made to high officers of state, and in which it has been held that statements made in such complaints are privileged, in the same manner as statements by masters relating to their servants. In none of these cases has it been suggested that there is any such absolute privilege as that contended for.

As to the other point, I think the evidence of express malice was sufficient.

MANISTY, J., concurred.

*Judgment for the plaintiff.*<sup>3</sup>

<sup>1</sup> 1 Wms. Saund. 120, 132.

<sup>2</sup> 3 Leon. 138.

<sup>3</sup> *Dickson v. Wilton*, 1 F. & F. 419; *Woods v. Wiman*, 122 N. Y. 445 *Accord.*  
— ED.

SECTION VII. (*continued.*)

(c) COMMUNICATION MADE IN THE INTEREST OF THE RECIPIENT.

CHILD v. AFFLECK, AND WIFE.

IN THE KING'S BENCH, MAY 13, 1829.

[*Reported in 9 Barnewall & Cresswell, 403.*]

CASE for a libel. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Westminster sittings after Hilary term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck for her character, and received the following answer, which was the alleged libel: "Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favor. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord Tenterden, C. J., was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff, were not evidence of malice, and he directed a nonsuit.

*F. Kelly* now moved for a rule *nisi* for a new trial.<sup>1</sup>

PARKE, J. The rule laid down by Lord Mansfield, in *Edmonson v. Stevenson*,<sup>2</sup> has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should

<sup>1</sup> The argument for the plaintiff and the opinions of LORD TENTERDEN, C. J., BAYLEY, and LITTLEDALE, JJ., are omitted. — ED.

<sup>2</sup> Bull. N. P. 8.

be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Prima facie* it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*,<sup>1</sup> evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*,<sup>2</sup> the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *prima facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege, *Rule refused*.<sup>3</sup>

<sup>1</sup> 3 B. & P. 587.

<sup>2</sup> 4 Bing. 395.

<sup>3</sup> *Servant Cases*.—*Edmonson v. Stevenson*, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Rogers v. Clifton*, 3 B. & P. 587; *Pattison v. Jones*, 8 B. & C. 578; *Gardner v. Slade*, 13 Q. B. 796; *Murdoch v. Funduklian*, 2 T. L. R. 614 (reversing s. c. 2 T. L. R. 215) *Accord*.

*Commercial Agency Cases*.—*Lemay v. Chamberlain*, 10 Ont. 638; *Todd v. Dun*, 12 Ont. 791; *Erber v. Dun*, 12 Fed. Rep. 526; *Johnson v. Bradstreet Co.*, 77 Ga. 172; *Pollasky v. Minchener*, 81 Mich. 280; *Mitchell v. Bradstreet Co.*, (Mo. 1893) 22 S. W. R. 358, 724; *King v. Patterson*, 49 N. J. 417; *Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Bradstreet Co. v. Gill*, 72 Texas, 115 *Accord*.

But information given to persons having no interest in the mercantile standing of the plaintiff—for example, reports sent by a commercial agency to its subscribers generally—is not privileged. *Erber v. Dun*, 12 Fed. Rep. 526; *Trussell v. Scarlett*, 18 Fed. Rep. 214 (criticising *Beardsley v. Tappan*, 5 Blatchford, 497); *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771; *Pollasky v. Minchener*, 81 Mich. 280; *Ormsby v. Douglass*, 37 N. Y. 477; *State v. Lonsdale*, 48 Wis. 348.

For other cases of communications privileged because made in answer to proper inquiries, see *Cockayne v. Hodgkinson*, 5 C. & P. 543; *Storey v. Challand*, 8 C. & P. 234; *Kine v. Sewell*, 3 M. & W. 297; *Hopwood v. Thorn*, 8 C. B. 293; *Robshan v. Smith*, 38 L. T. Rep. 423; *Weldon v. Winslow*, Odgers, Lib. & Sl. (2d ed.) 210; *Zuckerman v. Sonnenschein*, 62 Ill. 115; *Atwill v. Mackintosh*, 120 Mass. 177; *Howland v. Blake Co.*, 156 Mass. 543; *Fahr v. Hayes*, 50 N. J. 275; *Posnett v. Marble*, 62 Vt. 481; *Rude v. Nass*, 79 Wis. 321.

*Fiduciary Relations*.—Communications made in the line of a business duty, for example, by an agent or employee to his principal or employer are privileged. *Wright v. Woodgate*, 2 C. M. & R. 573; *Scarll v. Dixon*, 4 F. & F. 250; *Stace v. Griffith*, L. R. 2 P. C. 420; *Hume v. Marshall*, 42 J. P. 136; *Washburn v. Cooke*, 3 Den. 110; *Lewis v. Chapman*, 16 N. Y. 369.

*Family Relations*.—A *bona fide* communication by a brother to his sister reflecting on the character of her suitor is privileged. *Anon.* 2 Smith, 4, cited; *Adams v. Coleridge*, 1 T. L. R. 4. So is a similar communication by a son-in-law to his mother-in-law. *Todd v. Hawkins*, 2 M. & Rob. 20, 8 C. & P. 88, s. c. — *Ed.*

## COXHEAD v. RICHARDS.

IN THE COMMON PLEAS, JANUARY 31, 1846.

[Reported in 2 *Common Bench Reports*, 569.]

TINDAL, C. J.<sup>1</sup> This was an action upon the case for the publication of a false and malicious libel, in the form of a letter written by one John Cass, the first mate of a ship called *The England*, to the defendant; the letter stating that the plaintiff, who was the captain of the ship, and then in command of her, had been in a state of constant drunkenness during part of the voyage, whereby the ship and crew had been exposed to continual danger: and the publication by the defendant was, the communication by him of this letter to the owner of the ship, by reason whereof — which was the special damage alleged in the declaration — the plaintiff was dismissed from the ship, and lost his employment.

The defendant pleaded — first, not guilty; secondly, that the charges made by the mate against the plaintiff in his letter, were true; and, lastly, that the shipowner did not dismiss the captain by reason, and in consequence, of the communication of the letter to him.

Upon the last two issues a verdict was found for the plaintiff; but, upon the first issue, for the defendant.

I told the jury at the trial, that the occasion and circumstances under which the communication of this letter took place, were such, as, in my opinion, to furnish a legal excuse for making the communication; and that the inference of malice, — which the law *prima facie* draws from the bare act of publishing any statements false in fact, containing matter to the reproach and prejudice of another, — was thereby rebutted; and that the plaintiff, to entitle himself to a verdict, must show malice in fact: concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed to be a duty; but, for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. And the only question now before us, is, whether, upon the evidence given at the trial, such direction was right.

There was no evidence whatever that the defendant was actuated by any sinister motive in communicating the letter to Mr. Ward, the shipowner: on the contrary, all the evidence went to prove that what he did he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such duty, or in his mode of performing it. The writer of the letter was no stranger to the defendant: on the contrary, both were proved to have been on terms

<sup>1</sup> Only this opinion and the dissenting opinion of CRESSWELL, J., are given. ERLE, J., concurred with the Lord Chief Justice; COLTMAN, J., agreed with CRESSWELL, J. — ED.

of friendship with each other for some years; and, from the tenor of the letter itself, it must be inferred the defendant was a person upon whose judgment the writer of the letter placed great reliance, the letter itself being written for the professed purpose of obtaining his advice how to act, under a very pressing difficulty. The letter was framed in very artful terms, such as were calculated to induce the most wary and prudent man (knowing the writer) to place reliance on the truth of its details: and there can be no doubt but that the defendant did in fact thoroughly believe the contents to be true, amongst other things, that the ship, of which Mr. Ward was the owner, and the crew and cargo on board the same, had been exposed to very imminent risk, by the continued intoxication of the captain on the voyage from the French coast to Llanelly, where the ship then was, and that the voyage to the Eastern Seas, for which the ship was chartered, would be continually exposed to the same hazard, if the vessel should continue under his command. In this state of facts, after the letter had been a few days in his hands, the defendant considered it to be his duty to communicate its contents to Mr. Ward, whose interests were so nearly concerned in the information; not communicating it to the public, but to Mr. Ward; and not accompanying such disclosure with any directions or advice, but merely putting him in possession of the facts stated in the letter, that he might be in a condition to investigate the truth, and take such steps as prudence and justice to the parties concerned required: in making which disclosure he did not act hastily or unadvisedly, but consulted two persons well qualified to give good advice on such an emergency—the one, an Elder Brother of the Trinity House—the other, one of the most eminent ship-owners in London: in conformity with whose advice he gave up the letter to the owner of the ship. At the same time, if the defendant took a course which was not justifiable in point of law, although it proceeded from an error in judgment only, not of intention, still it is undoubtedly he, and not the plaintiff, who must suffer for such error.

The only question is, whether the case does or does not fall within the principle, well recognized and established in the law, relating to privileged or confidential communications; and, in determining this question, two points may, as I conceive, be considered as settled—first, that if the defendant had had any personal interest in the subject-matter to which the letter related, as, if he had been a part-owner of the ship, or an underwriter on the ship, or had had any property on board, the communication of such a letter to Mr. Ward would have fallen clearly within the rule relating to excusable publications—and, secondly, that if the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbor, the defendant would have been not only justified in making the disclosure, but would have been *bound* to make it. A man who

received a letter informing him that his neighbor's house would be plundered or burnt on the night following by A. and B., and which he himself believed, and had reason to believe, to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle.

As to the first, I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up. In *Pattison v. Jones*,<sup>1</sup> the defendant, who had discharged the plaintiff from his service, wrote a letter to the person who was about to engage him, unsolicited; he was therefore a volunteer in the matter; and might be considered as a stranger, having no interest in the business; but, neither at the trial, nor on the motion before the court, was it suggested that the letter was, on that account, an unprivileged communication; but it was left to the jury to say whether the communication was honest or malicious. Again, in *Child v. Affleck and Wife*, the statement, by the former mistress, of the conduct of her servant, not only during her service, but after she had left it, was held to be privileged. The rule appears to have been correctly laid down by the Court of Exchequer, that, "if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits."<sup>2</sup> In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot, therefore, properly be treated as a complete stranger to the subject-matter of inquiry, even if the rule excluded strangers from the privilege.

Upon the second ground of qualification — was the danger sufficiently imminent to justify the communication — it is true, that the letter, which came to the defendant's hands about the 14th of December, contains within it the information that the ship cannot get out of harbor before the end of the month. It was urged that the defendant, instead of communicating the letter to the owner, might have instituted some inquiry himself. But it is to be observed that every day the ship remained under the command of such a person as the plaintiff was described to be, the ship and crew continued exposed to hazard, though

<sup>1</sup> 8 B. & C. 578.

<sup>2</sup> 1 C. M. & R. 181.



not so great hazard as when at sea; not to mention the immediate injury to the shipowner which must necessarily follow from want of discipline of the crew, and the bad example of such a master. And, after all, it would be too much to say, that, even if the thing had been practicable, any duty was cast upon *the defendant*, to lay out his time or money in the investigation of the charge.

Upon the consideration of the case, I think it was the duty of the defendant not to keep the knowledge he gained by this letter himself, and thereby make himself responsible, in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew — that a prudent and reasonable man would have done the same; that the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from his interest in the subject-matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger; after which disclosure, not the defendant, but the owner, became liable to the plaintiff, if the owner took steps which were not justifiable; as, by unjustly dismissing him from his employment, if the letter was untrue. And, as all this was done with entire honesty of purpose, and in the full belief of the truth of the information, — and that, a reasonable belief, — I am still of the same opinion which I entertained at the trial, that this case ranges itself within the pale of privileged communication, and that the action is not maintainable.

I therefore think the rule for setting aside the verdict and for a new trial, should be discharged.

CRESSWELL, J. I cannot, without much regret, express an opinion in this case at variance with that which is entertained by my lord and one of my learned brothers. But, having given full consideration to the arguments urged at the bar, and the cases cited, and not being able to shake off the impression which they made in favor of the plaintiff, I am bound to act upon the opinion that I have formed. I will not repeat the facts of the case, which have been already stated, but proceed shortly to explain the grounds upon which my opinion rests.

There is no doubt that the letter published by the defendant of the plaintiff, was defamatory; and the truth of its contents could not be proved. The plaintiff was, therefore, entitled to maintain an action against the publisher of that letter, unless the occasion on which it was published made the publication of such letter a lawful act, as far as the plaintiff was concerned, if done in good faith, and without actual malice. To sustain an action for a libel or slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious. The law, however, on a principle of policy and convenience, authorizes many communications, although they affect the characters of individuals; and I take it to be a question of law, whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising

from the unauthorized publication of defamatory matter, fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact. In the present case, the existence of malice in fact was negatived by the jury; and if my lord was right in telling them, that, in the absence of malice in fact, the publication of the letter was privileged, this rule should be discharged. It therefore becomes necessary to inquire within what limits and boundaries the law authorizes the publication of defamatory matter. Perhaps the best description of those limits and boundaries that can be given in few words, is to be found in the judgment of Parke, B., in *Toogood v. Spyring*: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." It was not contended in this case that any *legal* duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned: the authority for the publication, if any, must therefore be derived from some *moral* duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any *public duty* to make the communication; neither his own situation nor that of any of the parties concerned, nor the interests at stake, were such as to affect the public weal. Was there then any *private* duty? There was no relation of principal and agent between the shipowner and the defendant, nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers: the duty, if it existed at all as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the defendant and the plaintiff. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the shipowner that which he *believed* to be true. Was, then, the defendant bound by any moral duty towards the writer of the letter, to make the communication? Surely not. If the captain had misconducted himself, the mate was capable of observing it, and was as capable of communicating it to the owner as to the defendant. The crew were, in like manner, capable of observing and acting for themselves. The mate (if he really believed that which he wrote to be true) might, indeed, be under a moral duty to communicate it to his owner: but the defendant had no right to take that vicarious duty upon himself: he was not requested by the mate to do so, but was, on the contrary, enjoined *not* to make the communication.

I will not attempt to comment upon the very numerous cases that

were quoted at the bar on the one side and on the other, but will advert to one or two which tend to explain the term "moral duty," and see whether it has ever been held to authorize the publication of defamatory matter under circumstances similar to those which exist in the present case. In *Bromage v. Prosser*, Bayley, J., in his very elaborate judgment, speaks of slander as "*prima facie* excusable on account of the cause of speaking or writing it, in the case of servants' characters, confidential advice, or communications to those who ask it or have a right to expect it." With regard to the characters of servants and agents, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that it may be well deemed the moral duty of former employers to answer inquiries to the best of their belief. But, according to the opinion of the same learned judge, intimated in *Pattison v. Jones*,<sup>1</sup> it is necessary that *inquiry* should be made, in order to render lawful the communication of defamatory matter, although he was also of opinion that such inquiry may be invited by the former master. And in *Rogers v. Clifton*, Chambre, J., quoted a similar opinion of Lord Mansfield's, expressed in *Lowry v. Aikenhead*.<sup>2</sup>

It was contended during the argument of this case, that the protection given to masters when speaking of the conduct of servants, was more extensive, and applied also to communications made to former employers; and *Child v. Affleck* was mentioned as an instance. But the communication to the former master was not made a ground of action in that case, and was introduced only as evidence that the statement made in answer to the inquiry of the new master was malicious. The same observation applies to *Rogers v. Clifton*; and it may be collected from that report that Chambre, J., was of opinion, that, where statements are made which are not in answer to inquiries, the defendant must plead, and prove, a justification.

Again, where a party asks advice or information upon a subject on which he is interested; or where the relative position of two parties is such that the one has a right to expect confidential information and advice from the other; it may be a moral duty to answer such inquiries and give such information and advice; and the statements made may be rendered lawful by the occasion, although defamatory of some third person, as in *Dunman v. Bigg*<sup>3</sup> and *Todd v. Hawkins*.<sup>4</sup>

Two cases — *Herver v. Dowson*<sup>5</sup> and *Cleaver v. Sarraude*, reported in *M'Dougall v. Claridge*<sup>6</sup> — were quoted as authorities for giving a more extended meaning to the term "moral duty," and making it include all cases where one man had information, which, if true, it would be important for another to know. But the notes of those cases are very short: in the former the precise circumstances under which the statement was made — see *King v. Watts*,<sup>7</sup> that such a statement made

<sup>1</sup> 8 B. & C. 578.

<sup>2</sup> Mich. 8 G. 3, 3 B. & P. 594.

<sup>3</sup> 1 Campb. 269.

<sup>4</sup> 2 M. & Rob. 20, 8 C. & P. 88.

<sup>5</sup> Bull. N. P. 8.

<sup>6</sup> 1 Campb. 268.

<sup>7</sup> 8 C. & P. 614.

*without inquiry* is not lawful—and in the latter, the position of the defendant with reference to the Bishop of Durham, to whom it was made, are left unexplained. I cannot, therefore, consider them as satisfactory authorities for the position to establish which they were quoted: and, in the absence of any clear and precise authority in favor of it, I cannot persuade myself that it is correct, as, if established at all, it must be at the expense of another moral duty, viz. not to publish defamatory matter unless you *know* it to be true.

For these reasons, I am of opinion, that the rule for a new trial should be made absolute.

The court being thus divided in opinion, the rule for a new trial fell to the ground, and the defendant retained his verdict.<sup>1</sup>

### BENNETT v. DEACON.

IN THE COMMON PLEAS, MAY 5, 1846.

[Reported in 2 Common Bench Reports, 628.]

CASE, for slander of the plaintiff in his trade.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before Coltman, J. The plaintiff is a wheelwright, carrying on business in the Wandsworth Road, near the terminus of the South-western Railway. The defendant is a timber-dealer and builder in the same neighborhood. On the 8th of October last, one William Clark, a timber-dealer who resided at Chiddingfold, in Surrey, having brought up a quantity of ash timber by the railway, entered into a treaty for the sale of it to the plaintiff on the 9th of October. Before the sale had been finally agreed upon, the defendant, meeting Clark in the road, inquired of him if he had sold his timber yet; to which Clark answered, "I believe I have: Bennett is going to have it." The defendant then asked, "Are you going to have ready money for it?" To this Clark answered, "I am going to have half ready money, and the other at a month's credit;" adding that he was

<sup>1</sup> "If it had been necessary, I should have been fully prepared to go the whole length of the doctrine laid down by Tindal, C. J., in the case of *Coxhead v. Richards*," per WILLES, J., in *Amann v. Damm*, 8 C. B. N. S. 592, 602. BLACKBURN, J., in *Davies v. Snead*, L. R. 5 Q. B. 605, 611, and LINDLEY, J., in *Stuart v. Bell*, '91, 2 Q. B. 341, 347, expressed similar approval of the opinion of Tindal, C. J.

*Vanspike v. Cleyson*, Cro. El. 541; *Peacock v. Reynell*, 2 Br. & Gold. 151, 15 C. B. N. S. 418, cited, s. c.; *Herver v. Dowson*, Bull. N. P. 8; *Cleaver v. Sarraude*, 1 Camp. 268, cited; *Picton v. Jackman*, 4 C. & P. 257; *Dixon v. Smith*, 29 L. J. Ex. 125, 126; *Masters v. Burgess*, 3 T. L. R. 96; *Stuart v. Bell*, '91, 2 Q. B. 341; *Hart v. Reed*, 1 B. Mon. 166; *Fresh v. Cutter*, 73 Md. 87; *Noonan v. Orton*, 32 Wis. 106 *Accord*.

*Cockayn v. Hutchinson*, 5 C. & P. 543 (*semble*); *King v. Watts*, 8 C. & P. 614; *Brown v. Vannaman* (Wis. 1893), 55 N. W. R. 183 *Contra*. — Ed.

going to get the timber drawn from the railway to Bennett's yard, in order to avoid demurrage. The defendant then remarked: "If you draw it down to Bennett's yard, you'll lose it; for, he owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." In consequence of this statement Clark declined to sell the timber in question to the plaintiff.

The learned judge thought that, though the communication might have been privileged if *bona fide* made in answer to inquiries addressed to the defendant as to the credit and circumstances of the plaintiff, yet, inasmuch as he had *volunteered* the information, the case did not fall within the exception to the general rule.

The jury returned a verdict for the plaintiff, damages 40s.

*Byles*, Serjt., in the course of the term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

*Talfourd*, Serjt., now showed cause.

TINDAL, C. J. I am unable to distinguish the case in principle from *Coxhead v. Richards*; and I see no reason at present to alter the opinion I there expressed. It seems to me that the communication in question, having been made *bona fide* to Clark in the ordinary course of, and in relation to, his business, was privileged, and that the rule should be made absolute.

COLTMAN, J., and CRESSWELL, J., differed from TINDAL, C. J., and adhered to the opinions given by them in *Coxhead v. Richards*.

ERLE, J., concurred with the Chief Justice.

*The court being equally divided in opinion, the verdict to stand.*

## "THE COUNT JOANNES" v. JOSEPH L. BENNETT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1862.

[Reported in 5 Allen, 169.]

TORT brought on the 12th of June, 1860, in the name of "The Count Joannes (born 'George Jones,')" for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage.

At the trial in this court, before Merrick, J., it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to show that he was on the most intimate terms of friendship with the parents, and that, on the 18th of May, 1860, being on a visit from his present residence in Lockport, New York, he called upon the father at his place of

business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house, it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter set forth in the first count<sup>1</sup> was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the tea-table in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match.

The judge ruled that the letter was not a privileged communication; and a verdict was returned for the plaintiff. The defendant alleged exceptions.

*G. W. Warren*, for the defendant.

The plaintiff, *pro se*.

BIGELOW, C. J. The doctrine, that the cause or occasion of a publication of defamatory matter may afford a sufficient justification in an action for damages, has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate and intelligible form. *Harrison v. Bush*, *Gassett v. Gilbert*,<sup>2</sup> and cases cited. It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libellous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. It did not even in-

<sup>1</sup> Only what relates to this count is given. — ED.

<sup>2</sup> 6 Gray, 94.

volve any sacrifice of his feelings or injury to his affections. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject-matter to which his communication concerning the plaintiff related. *Todd v. Hawkins*.<sup>1</sup> No doubt, he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that the defendant did not write and publish the alleged libellous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libellous statements concerning another. It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct.<sup>2</sup>

<sup>1</sup> 2 M. & Rob. 20; s. c. 8 C. & P. 88.

<sup>2</sup> *Krebs v. Oliver*, 6 Gray, 239; *Byam v. Collins*, 111 N. Y. 143 (DANFORTH, J., dissenting) *Accord*.

Anon., 15 C. B. N. S. 410 (cited); *Adcock v. Marsh*, 8 Ired. 360 *Contra*. — ED.

## MIRA BEALS v. AUGUSTIN THOMPSON AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1889.

[Reported in 149 Massachusetts Reports, 405.]

TORT for a libel contained in letters written by the defendant to the plaintiff's husband, and charging her with having been guilty of dishonorable conduct, deception, and ingratitude and dishonesty towards the defendant, whereby she lost the comfort and society of her husband, who refused to live longer with her.<sup>1</sup>

The jury returned a verdict for the plaintiff in the sum of \$30,000; and the defendant alleged exceptions.

*J. L. Hunt*, for the defendant.

*R. M. Morse, Jr.* (*F. A. Dearborn* with him), for the plaintiff.

FIELD, J. The exceptions also state, that the court refused "to instruct the jury that each of the letters mentioned in plaintiff's declaration was a privileged communication, and that this action could not therefore be maintained," and "instructed the jury that no privilege was shown." No facts are recited in the bill of exceptions which tend to show that the occasion was privileged, except such as may be inferred from the relation of the parties to each other, and from the contents of the letters. Taking the case most favorably for the defendant, it is that the plaintiff owed a debt to the defendant for money lent to her before her marriage, which, after her marriage with a rich man, she refused to pay, under circumstances which showed ingratitude on her part, and that the defendant wrote a letter to the husband defamatory of the plaintiff, for the purpose of compelling him or her to pay the debt. This is not a lawful method of collecting a debt, or of compelling another person than the debtor to pay it. The defendant owed no duty to the husband to inform him of the bad conduct of his wife before her marriage, and the husband was under no obligation to pay the debts of his wife contracted before her marriage. There is no evidence that the defendant in sending the letter to the husband was acting in the discharge of any duty, social, moral, or legal. The ruling was right. *Gassett v. Gilbert*,<sup>2</sup> *Krebs v. Oliver*,<sup>3</sup> *Joannes v. Bennett*, *Shurtleff v. Parker*,<sup>4</sup> *White v. Nicholls*.<sup>5</sup> *Exceptions overruled*.<sup>6</sup>

<sup>1</sup> The statement of the case has been condensed. — Ed.

<sup>2</sup> 6 Gray, 94.

<sup>3</sup> 12 Gray, 239.

<sup>4</sup> 130 Mass. 293.

<sup>5</sup> 3 How. 266.

<sup>6</sup> In *Simmonds v. Dunne*, Ir. R. 5 C. L. 358; *Ober v. Schiffing*, 102 Ind. 191; *York v. Johnson*, 116 Mass. 482, the communications were not privileged for want of a legitimate interest or duty on the part of the defendant. — Ed.



SECTION VII. (*continued.*)

(d) EXCESS OF PRIVILEGE.

## TOOGOOD v. SPYRING.

IN THE EXCHEQUER, TRINITY TERM, 1834.

[*Reported in 1 Crompton, Meeson & Roscoe, 181.*]

THE judgment of the court was delivered by

PARKE, B.<sup>1</sup> In this case, which was argued before my Brothers BOLAND, ALDERSON, GURNEY, and myself, a motion was made for a non-suit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the earl, and the plaintiff, who was generally employed by Brinsdon, the earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the defendant to believe that he had broken open the cellar door, and so obtained access to his cider. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was protected, and that the statement, upon the second meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publi-

<sup>1</sup> Only the opinion of the court is given. — ED.

cation affords a defence in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed<sup>1</sup>), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bona fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means *of necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is *sought* for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bona fide* in making the charge, or been influenced by malicious motives.<sup>2</sup> In the present case, the defendant stood in such

<sup>1</sup> Child v. Affleck, 4 Man. & Ryl. 590; 9 B & C. 403.

<sup>2</sup> Jones v. Thomas, 34 W. R. 104; Pittard v. Oliver, '92, 1 Q. B. 474; Broughton v. McGrew, 39 Fed. Rep. 672; Brow v. Hathaway, 13 All. 239; Billings v. Fairbanks,

a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact, that the imputation was made in Taylor's presence, does not, *of itself*, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

*Rule absolute for a new trial.*

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DUNCOMBE, Esq., M. P., v. DANIEL, Esq.

IN THE QUEEN'S BENCH, JANUARY 13, 1838.

[*Reported in Willmore, Wollaston, and Hodges, 101.1*]

**LIBEL.** The defendant pleaded not guilty, and also several pleas of justification. It was proved, at the trial before Lord Denman, C. J., at the Middlesex sittings, after last term, that the plaintiff had become a candidate to represent the borough of Finsbury in Parliament; and that he had addressed a circular letter to the electors of the borough, of whom the defendant was one, asking for their suffrages. That the first publication complained of, was written, as an answer to the plaintiff's circular; and the second, in consequence of the manner in which the defendant had been treated at the hustings, by the plaintiff and his friends, when the defendant was endeavoring to compel the plaintiff to answer certain matters set forth in the answer which he had published to the plaintiff's circular. Both the publications contained matter relating to the private conduct of the plaintiff, and imputed to him fraudulent behavior in certain money transactions; and misconduct with regard to certain statements put before the Vice-Chancellor, on a motion to obtain an injunction to stay proceedings on a judgment, which a creditor had obtained against him. The defendant's counsel

136 Mass. 177, 139 Mass. 66; Keane v. Sprague (N. Y. City Court), 30 Alb. L. J. 283 *Accord.*

Webber v. Vincent, 55 Hun, 612 *Contra.* — ED.

<sup>1</sup> 6 C. & P. 222, s. c. — ED.

contended, that it ought, under these circumstances, to be left to the jury to say, whether the publications were *bona fide*; and if they were found to be so, then, that under the plea of not guilty, the defendant was entitled to a verdict, on the ground that the publications being made by an elector to his brother electors, respecting the conduct of a candidate who was then seeking to obtain their suffrages, must be treated as privileged. Lord Denman, however, refused to direct the jury to find a verdict for the defendant, on that ground; and left the jury to say, whether they thought the justifications had been in fact made out. A verdict was returned for the plaintiff, — damages, £100.

*Sir W. W. Follett* now moved for a rule, to show cause why a new trial should not be granted, on the ground of a misdirection on this point. — Even on the plea of not guilty, the publication was justified, considering the position of the parties, and the time when the publication took place. It was a privileged communication, being a *bona fide* statement, made by one elector to the rest of the constituency. All the parties were interested in the election which was then going on; the plaintiff was a candidate; he submitted his pretensions to the electors, and therefore gave them a right to examine into his character and conduct. He asked them to declare him entitled to the honor of being their representative; and they were entitled to see whether he was deserving of that honor. This was clearly the right of all the electors, and it was the right of each individual elector. Each of the electors might inform his brother electors of any matter relating to a subject in which they all had a common interest, provided that the statement was made *bona fide*, and that was a question for the jury. [LORD DENMAN, C. J. How may this supposed right of privileged publication be exercised?] — As it was here, by sending the communication to a newspaper. [COLERIDGE, J. Then you must contend for a right of publication to all the world, for the newspapers are not read by the electors of Finsbury alone.] — If the publication cannot be made to the electors, without all the world becoming acquainted with it, then the publication to all the world may be justified on the ground of necessity. Try this question in this manner. The elector has a right *bona fide*, to publish to his brother electors matter relating to the conduct and character of the candidate. Would he not have a right to go on the hustings and make the statement? Yet that would in effect be a publication to all the world; for there are no means of preventing non-electors from being present. He would clearly have a right to send a letter to each individual elector. He would have a right to print a placard and circulate it in the borough. Then may he not publish it in the newspapers? This case may come within the rule adopted in the cases where a privileged communication has been made in the presence of a third party. *Toogood v. Spyring* decided that a charge brought by A. against B. in the presence of a third person, was privileged, if done honestly and *bona fide*; and that the circumstance of its being stated in the presence of a third person, did not of itself make it unauthorized, but that

it was a question to be left to the jury to determine from the circumstances, whether A. acted *bona fide*, or was influenced by malicious motives. The question of *bona fides* ought to have been left to the jury in this case. There are many cases in which parties making publications solely for their private advantage, have been held to be protected, if they have acted *bona fide*. *Delaney v. Jones*,<sup>1</sup> and *Stockley v. Clement*.<sup>2</sup> All these cases show, that where the parties have an interest in the subject, they are protected in publishing *bona fide* statements, which, but for such circumstances, would be libellous.

LORD DENMAN, C. J. It does not appear to us, that on this point there should be any rule, for however large may be the privileges of electors, it would be extravagant to suppose, that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate.

LITLEDALE, WILLIAMS, and COLERIDGE, JJ., concurred.

*Rule refused.*<sup>3</sup>

## ISAAC MARKS v. JAMES H. BAKER.

. IN THE SUPREME COURT, MINNESOTA, JULY 25, 1881.

[Reported in 28 Minnesota Reports, 162.]

BERRY, J. This is an action for libel. The plaintiff was, at the times hereinafter mentioned, treasurer of the city of Mankato, and, as such, custodian of the moneys, and from April 1 to 6, 1880, a candidate for re-election to the same office, at an election fixed for the latter day. The defendants were residents and tax-payers of the city, and publishers thereof of the Mankato Free Press, a weekly newspaper, and as such they published therein, on April 2, 1880, the article complained of, in which, as the plaintiff claims in his complaint, they charged and intended to charge the defendant as treasurer with embezzling city funds. It is alleged in the complaint that the matter charged as libellous was of and concerning the plaintiff in his office — that it was

<sup>1</sup> 4 Esp. 191.

<sup>2</sup> 4 Bing. 162.

<sup>3</sup> *Jones v. Varnum*, 21 Fla. 431; *Bronson v. Bruce*, 59 Mich. 467; *Wheaton v. Buchan*, 66 Mich. 307; *Belknap v. Ball*, 83 Mich. 583; *Aldrich v. Press Co.*, 9 Minn. 133 (but see, *contra*, *Marks v. Baker*, *infra*); *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613; *Hunt v. Bennett*, 19 N. Y. 173; *Seeley v. Blair*, *Wright* (Ohio), 353, 683; *Sweeney v. Baker*, 13 W. Va. 158 *Accord*.

But a communication to the electors alone is privileged, if made in good faith. *Wisdom v. Brown*, 1 T. L. R. 412; *Parkhurst v. Hamilton*, 3 T. L. R. 500; *Burke v. Mascarich*, 81 Cal. 302 (*semble*); *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251; *State v. Balch*, 31 Kans. 465; *Commonwealth v. Wardwell*, 136 Mass. 164; *Briggs v. Garrett*, 111 Pa. 404.

But see, *contra*, *Smith v. Burrus*, 106 Mo. 94, where the distinction between fair comment and qualified privilege was overlooked. — ED.

false and defamatory, and that the publication was malicious. The answer denies malice, all intent to injure or defame plaintiff, any intention on defendants' part to charge him with embezzlement, and alleges that defendants published the article complained of, as a communication, solely for the purpose of calling the attention of the public to the matter therein referred to, viz., to a discrepancy in certain official reports tending to show that the plaintiff had failed to charge himself with the full amount of city funds which he had received from the county treasury, and with the view of obtaining an inquiry as to the cause of such discrepancy. The answer further alleges that "the publication was made in good faith; . . . that defendants believed that there was reasonable cause for the publication;" and "that they were then and there discharging a sacred and moral obligation as . . . editors and publishers." The reply puts these allegations of the answer in issue. Upon the trial it was admitted that, notwithstanding the discrepancy, (which in fact existed,) the plaintiff had accounted for the full sum received by him as city treasurer from the county treasurer, so that the defendants' charge or insinuation to the contrary was false.

Defendant, Baker, having been called for the defence, was asked the questions following, to which he made answers as follows, all against the objection and exception of the plaintiff:

(1) "Did you believe the report of the city recorder to be true? *Answer.* I did believe it to be true. (This report was that from which, as defendants in the alleged libel charged or insinuated, it appeared that plaintiff had failed to account for all the money received by him from the county treasurer.)

(2) "What was your object in publishing the article? *Answer.* I published it for the general public interest.

(3) "Did you have any other object in publishing the article? *Answer.* I did not.

(4) "You have stated that you had no other purpose than doing a public duty in publishing the article. I want to know what your object was, — to charge somebody with a crime, or whether you had some other object? *Answer.* To draw attention to the discrepancy of the two reports. I had seen what purported to be the official report of the county auditor, and I had seen the city recorder's; and the county auditor's showed that Marks, as city treasurer, had received from the county, during the fiscal year, \$115.02 more than the city recorder's report showed that he had received from the county for the same time. (These are the two reports between which the discrepancy was charged to exist.)

(5) "Did you, by publishing the article, intend to charge the plaintiff with embezzling any sum whatever? *Answer.* I did not."

The defence set up in the answer is, in effect, that the publication complained of is a privileged communication.

The rule is that a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference

to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice which the law draws from defamatory words is rebutted, and the *onus* of proving actual malice is cast upon the person claiming to have been defamed. *Too-good v. Spyryng*; 2 *Addison on Torts*, § 1091; *Harrison v. Bush*; *Moak's Underhill on Torts*, 146; *Quinn v. Scott*.<sup>1</sup> That the subject-matter of the communication is one of public interest in the community of which the parties to the communication are members, is sufficient, as respects interest, to confer the privilege. *Purcell v. Sowler*; <sup>2</sup> *Palmer v. City of Concord*; <sup>3</sup> *Cooley on Torts*, 217. The subject-matter of the communication in the case at bar was one of public interest in the city of Mankato, where the publication was made, and one in which the defendants had an interest as residents and tax-payers of the city. It was, therefore, a privileged communication, within the rule mentioned, if made in good faith.<sup>4</sup> *Judgment affirmed*.<sup>5</sup>

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### GEORGE W. L. HATCH v. ELIAS N. LANE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1870.

[Reported in 105 *Massachusetts Reports*, 394.]

TORT for publishing in the "Taunton Daily Gazette" the following notice, signed by the defendant, concerning the plaintiff: "A young man named George Hatch having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business."

At the trial in the Superior Court, Wilkinson, J., ruled "that the publication was a privileged communication if made in good faith in a local newspaper published in Taunton and the jury should find it was a necessary or reasonable mode of giving notice." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.<sup>6</sup>

*S. R. Townsend*, for the plaintiff.

*J. Brown*, for the defendant, was not called upon.

WELLS, J. The case shows that the defendant was entitled to the benefit of his plea of privilege. No exception was taken to the ruling on that point. The exception is to the refusal of the court below to rule as requested by the plaintiff; "as matter of law, that the whole community had no such interest corresponding to the interest of the defendant in the subject-matter of the publication, as would authorize him to

<sup>1</sup> 22 Minn. 456.

<sup>2</sup> L. R. 2 C. P. Div. 215.

<sup>3</sup> 48 N. H. 211.

<sup>4</sup> The court found that the defendant acted in good faith. — ED.

<sup>5</sup> *Briggs v. Garrett*, 111 Pa. 404 (*semble*); *Express Co. v. Copeland*, 64 Tex. 354 *Accord*. — ED.

<sup>6</sup> The statement of the case is abridged. — ED.

make it through the medium of a public newspaper." The question thus raised relates only to the mode adopted to make the communication to those for whom it was properly intended. They were the customers of a baker, who "employed several drivers, selling and delivering bread in Taunton and adjoining towns." The fact that a communication is made in the hearing of others than the parties immediately interested will not, of itself, defeat the defence of privilege. *Brow v. Hathaway*.<sup>1</sup> If the circulation of the newspaper was more extensive than the routes of the defendant's business; or if the communication thereby came to the notice of persons not customers of the defendant, that fact would not, of itself, defeat the defence of privilege; nor necessarily prove malice. It would be evidence upon the question of express malice, to be considered by the jury. That question was submitted to the jury, under proper instructions; and the jury, by their verdict, have found that it was a reasonable mode of giving the notice; thus negating express malice. *Exceptions overruled*.<sup>2</sup>

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WILLIAMSON v. FREER.

IN THE COMMON PLEAS, APRIL 20, 1874.

[*Reported in Law Reports, 9 Common Pleas, 393.*]

THIS was an action for a libel, tried before Brett, J., at the last assizes for Leicester. The facts were as follows: The plaintiff was employed as assistant in the shop of the defendant, a shoemaker, at Leicester. The defendant having accused the plaintiff of robbing him of money, sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The first telegram was to this effect: "Come at once to Leicester, if you wish to save your child from appearing before a magistrate." The second was as follows: "Your child will be given in charge of the police unless you reply and come to-day. She has taken money out of the till."

The charge was persisted in down to the trial; but there was no evidence to support it. It did not appear that, beyond the officials of the post-office, through whose hands the telegrams passed, they had come to the knowledge of any other persons than the father, mother, and brother of the plaintiff.

The learned judge left it to the jury to say whether the statements were libellous, and whether it was reasonable to transmit them by telegraph rather than by post.

<sup>1</sup> 13 Allen, 239.

<sup>2</sup> *Delaney v. Jones*, 4 Esp. 191 (but see *Ley v. Lawson*, 4 A. & E. 798); *Commonwealth v. Featherston*, 9 Phila. 594; *Holliday v. Ontario Co.*, 33 Up. Can. Q. B. 558 (*semble*) *Accord.* — ED.



The jury found that the statements were libellous, and that it was not reasonable to send them by telegraph, and they returned a verdict for the plaintiff, damages £100.

*O'Malley*, Q. C. (with him *Merewether*), pursuant to leave, moved to enter a verdict for the defendant.<sup>1</sup>

BRETT, J. I reserved the point because I thought it was a very important one. It is whether, where a communication is to be made to a relative of a person against whom a charge is preferred, which communication would be privileged if sent by letter in the ordinary way, the privilege is not lost by sending it in the form of a telegram, — whether a communication in that form can be said to be made to one person, when in point of fact it passes through several hands before it reaches its ultimate destination. Privilege is not wanted unless the publication is libellous. The question then is whether the character of an innocent person is to be destroyed because the libeller thinks fit to send the libel in this shape rather than in a sealed letter. I do not mean to say that there was malice in fact here. But I agree with my Lord that sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to put this higher. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card.<sup>2</sup> It was never meant by the Legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons. As to the damages, I am not at all disposed to think them excessive. The charge against the plaintiff was of a very grave character. It was made with considerable severity, and it was insisted upon even down to the trial.

*Rule refused.*<sup>3</sup>

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# PULLMAN AND ANOTHER v. WALTER HILL & CO., LIMITED.

IN THE COURT OF APPEAL, DECEMBER 18, 19, 1890.

[Reported in (1891) 1 *Queen's Bench Reports*, 524.]

MOTION by the plaintiffs for a new trial.

At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. & J. Pullman, in which

<sup>1</sup> The statement of the case is abridged; the arguments of counsel and the concurring opinions of LORD COLERIDGE, C. J., and DENMAN, J., are omitted. — ED.

<sup>2</sup> *Robinson v. Jones*, L. R. 4 Ir. 391 *Accord.* — ED.

<sup>3</sup> *Robinson v. Jones*, L. R. 4 Ir. 391 *Accord.* See also *Smith v. Crocker*, 5 T. L. R. 441; *Muetze v. Tuteur*, 77 Wis. 236. — ED.

there were three other partners. The place of business of the firm was No. 17, Greek Street, Soho. The plaintiffs were the owners of some property in the Borough Road, which they had contracted in 1887 to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter:—

“Messrs. Pullman & Co., 17, Greek Street, Soho.

“*Re Boro' Road.*

“Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

“Yours faithfully,

“(Signed) Walter Hill & Co., Limited.”

This letter was dictated by the defendants' managing director to a short-hand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17, Greek Street, Soho. The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore nonsuited the plaintiffs.<sup>1</sup>

*Lockwood*, Q. C., and *Oswald*, for the plaintiffs.

*Murphy*, Q. C., and *R. M. Bray*, for the defendants.

LORD ESHER, M. R. Two points were decided by the learned judge: (1) that there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defam-

<sup>1</sup> The arguments of counsel and the concurring opinions of LOPES and KAY, L.JJ., are omitted. — ED.

atory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shown it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plain-

tiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libellous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

*Order for new trial.*

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### TOMPSON v. DASHWOOD.

IN THE QUEEN'S BENCH DIVISION, APRIL 30, 1883.

[*Reported in 11 Queen's Bench Division Reports, 43.*]

WATKIN WILLIAMS, J.<sup>1</sup> I am of opinion that this rule should be discharged. The position of the parties is this: At the trial, before Cave, J., at the Warwick Winter Assizes, 1883, the following facts were proved in evidence or admitted: The plaintiff was the managing director, with a salary, of the Birmingham Vinegar Brewery Company, Limited. The defendant was a director of the same company. On the 29th of November, 1882, the plaintiff and the defendant were about to make a journey to the Continent upon the business and at the expense of the company, and upon that day the defendant wrote two letters. One of them (being the alleged libel) was written to Colonel Wood, the chairman of the company, and began "Dear Colonel Wood," and after stating that the plaintiff intended to start for the Continent on the following night, suggested that the secretary's cash-book should be looked into, in order to see what sums the plaintiff had charged against the

<sup>1</sup> Only the opinions of the court are given. — ED.

company for travelling and other expenses, and that these sums were excessive, the innuendo alleged being that some of the expenses so charged had never really been incurred. The defendant wrote the other letter about a different matter to the secretary of the company, who was the plaintiff's brother, and by a mistake the defendant put each letter into the envelope intended for the other, so that the letter written to Colonel Wood went to the plaintiff's brother, who read and made a copy of it, and handed the original over to the plaintiff. The action is founded upon the allegation that the defendant falsely and maliciously wrote and published of the plaintiff the letter set out in the statement of claim. The learned judge at the trial directed the jury that the occasion upon which, and circumstances under which, the letter was written made it privileged. It was therefore necessary that the plaintiff in order to succeed should prove not only that the words complained of in the letter were defamatory, in the sense of being injurious, but also that they were written with actual malice. The jury gave a verdict for the defendant, and this rule was obtained on the ground of misdirection. The law stands thus, if a man writes and publishes of another that which is defamatory and untrue the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice; he need only prove the defamatory and untrue character of the statements of which he complains. But there are occasions on which the law regards the defendant as so placed and having such an interest with respect to the subject-matter of the libel that, upon principle founded on common sense, the legal implication of malice is removed. That is the doctrine of privilege. The question here is whether or not the defendant was so circumstanced with respect to the subject-matter of the letter that the *prima facie* implication of malice, which the law would otherwise make, was rebutted. It is admitted that the defendant stood in such a relation to Colonel Wood that in writing to him the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended for the plaintiff that, the defendant having carelessly put the letter in the wrong envelope, so that it reached the hands of a person with whom he had no such relation, the protection of privilege is destroyed, and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question, though there have been cases to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege. I am of opinion that there was no misdirection.

MATHEW, J. I am of the same opinion. I come to the conclusion that the rule ought to be discharged for the reason that there was no evidence that the defendant had any malicious feeling in writing the letter and sending it to the plaintiff's brother. Nothing more than negligence was shown; the letter was written honestly to the chairman, and a mistake was made through the defendant's negligence. It is said that for the consequences of that negligence he is responsible. If that view be correct, on the same principle this action would lie if all that the defendant did was to leave the letter about so that another could read it. I may add that the evidence of negligence here was extremely slight, because any one looking at the first line of the letter would see that it had been put by mistake into the wrong envelope.

*Rule discharged.*<sup>1</sup>

<sup>1</sup> A defamatory statement true of A. but published concerning B., by mistake, will support an action by B. *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Griebel v. Rochester Co.*, 60 Hun, 319. But see, *contra*, *Hanson v. Globe Co.* (Mass. 1893), 34 N. E. R. 462 (Holmes, Morton, and Barker, JJ., dissenting).

Compare *Brett v. Watson*, 20 W. R. 723; *Fox v. Broderick*, 14 Ir. C. L. R. 453, 459; *Lorbl v. Breidenbach*, 78 Wis. 49. — ED.

## SECTION VIII.

*Malice.*

## BROMAGE AND ANOTHER v. PROSSER.

IN THE KING'S BENCH, EASTER TERM, 1825.

[Reported in 4 *Barneswall & Cresswell*, 247.]

BAYLEY, J., now delivered the judgment of the court.<sup>1</sup> This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiff's bank had stopped, the defendant's answer was, "It was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told, at Crickhowell, there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiff: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the judges, or at least by the four who thought the

<sup>1</sup> Only the opinion of the court is given. — Ed.

truth might be given in evidence on the general issue), in *Smith v. Richardson*; <sup>1</sup> and it is laid down in 1 Com. Dig. action upon the case for defamation, G 5, that the declaration must show a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the words *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse.<sup>2</sup> And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Style*, 392, and was adjudged upon error in *Mercer v. Sparks*.<sup>3</sup> The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servant's characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson*,<sup>4</sup> Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*,<sup>5</sup> where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is

<sup>1</sup> Willes, 24.<sup>2</sup> Owen, 51; Noy, 35.<sup>3</sup> 1 Term Rep. 110.<sup>2</sup> Russell on Crimes, 614, N. 1.<sup>4</sup> Bull. N. P. 8.



sufficient to prove publication ; the motives of the party publishing are never gone into, and that the same doctrine held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character ; and Buller, J., said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words " malicious " as well as *false*. Buller, J., repeats in *Pasley v. Freeman*,<sup>1</sup> that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*,<sup>2</sup> Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favor of the defendant upon the first ; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration ; and had the learned judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact

<sup>1</sup> 3 T. R. 61.<sup>2</sup> 3 Burr. 2425.

for the consideration of the jury; for if the jury should think that when Watkins asked his question the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute. *Rule absolute.*

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### JACKSON v. HOPPERTON.

IN THE COMMON PLEAS, MAY 25, 1864.

[*Reported in 12 Weekly Reporter, 913.*]

THIS case was tried before Williams, J., at Guildhall, in the sittings after last Easter Term.

The declaration stated that, "before the speaking, &c., the defendant had been a man-milliner, and the plaintiff had been in his service and employ as a saleswoman and assistant, and the defendant falsely, &c., spoke, &c., of the plaintiff the words 'Miss Jackson' (thereby meaning the plaintiff) 'is dishonest,' thereby meaning that the plaintiff was a thief and a dishonest servant, and had been guilty of fraudulent conduct in her capacity as such saleswoman, &c., whereby, &c., the plaintiff was injured in credit and reputation, and certain persons trading under the name and style of 'Capper, Son, & Co.' refused to employ the plaintiff as saleswoman and servant in their employ, as they otherwise would have done, and the plaintiff lost and was deprived of her said situation in the employ of the said 'Capper, Son, & Co.,' and has been for a long space of time unable to obtain employment, &c."

Plea — Not guilty.

The plaintiff entered the defendant's service on December 1st, 1862, and remained in his employ till October, 1863, when she left, he having accused her of taking some money, and a few other things. Shortly after she left, she returned for her boxes, and asked him for her wages, and he then accused her of taking £3 10s., but said, "if you had come back, I should have said nothing about it." A few days after he paid her her wages. Two or three days after this, she applied to the Messrs. Capper, Son, & Co. for a situation; and she informed the defendant that a young lady was coming to him for a reference, and he then said, "I will give you no reference, but if you own that you took the money I will give you a reference." The lady from Messrs. Capper, Son, &

Co. called at the defendant's and asked him for the plaintiff's character, when he spoke the words in the declaration, and said he would not give her a character, she was dishonest, and that he had money and goods which he could prove she had taken. The plaintiff did not get the situation, the wages for which were £50 a year and board. The jury found a verdict for the plaintiff for £60.

*Mr. Chambers*, Q. C. (*Hance* with him), now moved for a rule calling on the plaintiff to show cause why this verdict should not be set aside, and instead thereof a nonsuit entered, on the ground that there was no evidence of express malice; or for a new trial, on the grounds that the verdict was against the evidence, and that the damages were excessive.

ERLE, C. J. I am of opinion that there should be no rule in this case. This was an action for defamation of character, and evidence was adduced on the part of the defendant to show that the defamatory words were uttered on an occasion which justified the use of them. The question left to the jury was, whether the defendant believed the imputation of dishonesty, which he made against the plaintiff, was true or not, and they found he did not believe it to be so, and the judge is satisfied with their answer. I think this was a necessary question to be left to them. Then, as to the damages being excessive, the plaintiff lost a situation for which she would have received £50 a year, and it cannot be said that £60 is too large a sum as compensation for that loss. *Mr. Chambers* also moved on the ground that it was the judge's duty to nonsuit the plaintiff at the close of the plaintiff's case; but she tried to get another situation, and a lady called on the defendant for her character, and he then spoke to the lady the words complained of; where words are spoken on such an occasion as that, if the person uttering them believe them to be true, and there be no further evidence to show a probability that they were spoken maliciously, it is the duty of the judge to nonsuit the plaintiff. The cases of *Taylor v. Hawkins*<sup>1</sup> and *Somerville v. Hawkins* show what is the law under such circumstances, and lay down that, if the plaintiff give evidence from which the jury might infer malice, such as, that the defendant made the imputations not believing them to be true, or that at the time when he spoke the words he did not believe he was in the discharge of a duty, the question of malice ought to be left to the jury; and it appears from the old cases, and also the two cases above cited, that defamation carries with it a presumption of malice, and that it is *prima facie* evidence of malice, but the occasion on which the defamatory words are spoken may rebut the *prima facie* inference of malice, and then additional evidence may be given to show that there was malice, and the jury are to find on that evidence and on the libel itself whether there be malice. In the case of *Wright v. Woodgate*,<sup>2</sup> it is thus laid down by Parke, B., at p. 577: "The proper meaning of a privileged communication is only

<sup>1</sup> 16 Q. B. 308.

<sup>2</sup> 2 C. M. & R. 573.

this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice; in fact, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. In the present case, it became, in my opinion, incumbent upon the plaintiff to show malice in fact. This he might have made out, either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill-will." And in *Taylor v. Hawkins*, Lord Campbell lays it down at p. 321 thus: "The rule is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice." I think that the fact of his charging her with stealing the £3 10s., and, not making that charge till after she had threatened to leave, and then the fact of his telling her that if she had come back he should have said nothing about it, and that if she owned she took it he would give her a reference, were sufficient facts to justify the jury in inferring that he was not performing the important duty between man and man, of stating what he believed to be the plaintiff's true character, when he spoke the words which are the subject of this action.

WILLIAMS, WILLES, and BYLES, JJ., concurred.

*Rule refused.*<sup>1</sup>

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### SOMERVILLE v. HAWKINS.

IN THE COMMON PLEAS, HILARY TERM, 1851.

[Reported in 10 Common Bench, 583.]

THIS was an action upon the case for slander.

The defendant pleaded not guilty.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1848. It appeared, that the plaintiff had been in the service of the defendant, and had been dismissed on a Thursday, in consequence of some articles being missed, which he was suspected of having stolen; and that, when he went to the defendant's shop on the following Saturday to receive the wages due to him, the defendant called Jones and Williams, the other two servants, into the counting-house, and, speaking of the plaintiff, said to them — "I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him."

For the defendant, it was submitted that this was a privileged communication.

<sup>1</sup> *Atwill v. Mackintosh*, 120 Mass. 177 *Accord.* — ED.

On the other hand, it was insisted, that the act complained of was perfectly gratuitous, not like a communication made to a confidential person, or a matter that the other servants had any interest in; and that it was a question for the jury, whether the statement was made under circumstances which indicated malice.

The Lord Chief Justice was of opinion that this was a privileged communication, and that there was no evidence of malice, and thereupon directed a nonsuit to be entered.<sup>1</sup>

*E. James*, in the following Easter term, obtained a rule *nisi* for a new trial, on the ground of misdirection. He cited *Wright v. Woodgate*.<sup>2</sup>

*Byles*, Serjt., in Trinity term, 1849, showed cause.

*E. James*, in support of the rule.

MAULE, J., now delivered the judgment of the court.<sup>3</sup>

This was an action for words imputing theft, spoken by the defendant of the plaintiff. The defendant pleaded not guilty, and a justification.

At the trial, before Wilde, C. J., it appeared that the plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft; that he afterwards came to the defendant's house, and had some communication with the defendant's servants; and that the words in question, — "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him," — were spoken by the defendant to his servants.

The Lord Chief Justice was of opinion that this was a privileged communication; and that there was no evidence of malice; and that the verdict must be found for the defendant on the general issue: but he offered to go on and try the issue on the justification. This the plaintiff declined; and thereupon the Lord Chief Justice directed a nonsuit to be entered.

The plaintiff obtained a rule *nisi* for a new trial, on the ground of misdirection.

It was contended for the plaintiff, upon the argument on showing cause, that the Lord Chief Justice was mistaken in both respects, *i. e.*, that the communication was not privileged, and that there was evidence of malice.

But we think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge, — a supposition

<sup>1</sup> The statement of the case is abridged, and the arguments of counsel are omitted. — Ed.

<sup>2</sup> 2 C. M. & R. 573.

<sup>3</sup> The case was argued in Trinity term, 1849, before WILDE, C. J., COLTMAN, J., MAULE, J., and CRESSWELL, J.

always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

We think, therefore, the communication in question was privileged, *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to show affirmatively that the words were spoken maliciously; for, the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favor of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence: and considering, as we have before observed, that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the Lord Chief Justice was right in not leaving the question to them, and consequently that this rule must be discharged.

*Rule discharged.*

## JENOURE, DEFENDANT, AND DELMEGE, PLAINTIFF.

IN THE PRIVY COUNCIL, DECEMBER 19, 1890.

*[Reported in Law Reports (1891), Appeal Cases, 73.]*

LORD MACNAGHTEN.<sup>1</sup> This was an action of libel brought by the respondent Louis Edward Delmege against the appellant Frederick Alfred Jenoure.

The respondent is a government medical officer in the parish of Portland. The appellant is a pen-keeper residing in the same parish, and a justice of the peace.

The libel complained of was contained in the following letter addressed by the appellant to the inspector of constabulary for the district.

“Boston, Priestman River,  
14th January, 1888.

“Sir, — I have been informed on good authority that Dr. Delmege, of Manchioneal, was called by one Lindsay (who, I believe, is his servant) to attend a woman in labor named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, although implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into this matter, and if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed.

“I am, Sir,

“Your obedient servant,

“F. A. JENOURE, J. P.

“R. L. Rivett, Esq.,

“Inspector of Constabulary,

“Port Antonio.”

The appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged.

The action was tried before Sir Adam Gib Ellis, C. J., and a special jury. In the result the jury returned a general verdict for the respondent with £50 damages, and judgment was entered accordingly.

The appellant moved for a new trial. The motion was made on several grounds. But on the 26th of July, 1888, a rule was granted, only on the ground of misdirection with regard to the question of privilege.

The rule came on for argument before Ellis, C. J., and Curran and

<sup>1</sup> Only the opinion of the court, and that, too, slightly abridged, is given. — Ed.

Northcote, JJ. On the 5th of September, 1888, the court unanimously discharged the rule and confirmed the judgment.

The appellant subsequently applied for and obtained special leave from her Majesty in council to prefer an appeal.

Their Lordships have not the advantage of seeing a note of the summing-up. But the substance of it, so far as material on the question of misdirection, is stated very clearly in the judgment of the Chief Justice upon the application to make the rule absolute.

The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the inspector of constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing-up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question as to the *bona fides* of the defendant arises as preliminary to the existence of privilege." Where, however, "it is alleged that the defamatory communication was made in discharge of a duty," his view was that the defendant must "satisfy the jury that he made the communication with a belief in its truth." "No doubt," he adds, "the *dicta* of some of the judges in the masters and servants cases cited seem to extend to all classes of privileged communications; but no case was cited, and I have been able to find none, where, when privilege was claimed on the ground that the communication was made in the discharge of a duty, it has been held that the plaintiff, to support his action, must prove express malice. . . . In the one case, there can be no room for doubt that, if the defendant establish the relation which existed between him and the plaintiff, a privilege arises which can only be overcome by proof of express malice. In the other, the authorities already cited show that, where a defendant claims privilege in respect of a charge of misconduct volunteered by him, he must satisfy the jury that he acted *bona fide* before the question of privilege arises for the determination of the judge."



There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes, — *Wright v. Woodgate*,<sup>1</sup> — "is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clark v. Molyneux*, to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L. J., used the following language, every word of which is applicable to the present case. "The burden of proof," he said, "lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bona fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the

<sup>1</sup> 2 C. M. & R. 577.

plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

Their Lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed, it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true; whereas the letter itself put those statements forward, not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

Their Lordships think that the verdict cannot stand, and that there ought to be a new trial.

### CLARK v. MOLYNEUX.

IN THE COURT OF APPEAL, DECEMBER 4, 1877.

[Reported in 47 *Law Journal Reports*, *Common Law*, 230.<sup>1</sup>]

THE action was for slander and libel. The plaintiff, a clergyman of the Church of England, had been formerly in the army, but left it in the year 1863; and, after taking his degree at Cambridge, was ordained by the Bishop of Exeter, and subsequently became curate at Assington, to the Rev. H. L. Maud.

In March, 1876, the defendant, the Rev. Canon Molyneux, the Rector of Sudbury, which is in the neighborhood of Assington, when calling on a Mr. G. Bevan, a banker, with whom he had been intimate for twenty-four years, was informed by Mr. Bevan that the plaintiff was going to preach one of a course of Lenten sermons at Newton Church, in the neighborhood, and that he was sure that if Mr. Charles Smith, the rector, knew what sort of a person the plaintiff was, he would never permit him to preach in his church. ~~Mr. Bevan~~<sup>Mr. Bevan</sup> then desired the defendant, as an old friend of Mr. Smith's, to let him know what the plaintiff's character was. In answer to the defendant's inquiry as to what was the nature of the charges against the plaintiff, Mr. Bevan said that he had been obliged to leave the army through cheating with cards, had lived an irregular life at Cambridge, had been guilty of gross immorality when curate at Horringer, and had boasted of it. The defendant, placing implicit reliance on Mr. Bevan, and thinking that it was his duty to acquaint Mr. Charles Smith with the matter, at once rode to his house, and, finding that he was ill in bed, communicated his information to the Rev. H. Smith, his son, who was in the house.

At the end of the same month the defendant consulted the Rev. J. C.

<sup>1</sup> 3 Q. B. Div. 237, s. c. — ED.

Martyn, his rural dean, as to whether he should not speak to Mr. Maud, the plaintiff's rector. Mr. Martyn said he thought the defendant ought to do so. As Mr. Maud was abroad, the defendant spoke to his solicitor on the subject; and on Mr. Maud's return he received a letter from him, asking for information. The defendant wrote an answer detailing the facts substantially as communicated to him by Mr. Bevan; but some of the expressions in the letter were stronger than those used by Mr. Bevan. "Profligate" was used instead of "irregular," and "expelled the army," instead of "obliged to leave the army."

The defendant also consulted Mr. Green, his curate, who was announced to preach one of the same course of sermons as the plaintiff. Mr. Green had been with the plaintiff for twenty years, and was consulted by him on every ecclesiastical matter that came before him.

The communications made to Mr. Green, Mr. H. Smith and Mr. Martyn were the slanders complained of, and the letter to Mr. Maud was the libel.

The defendant relied solely on the privilege of the occasions and the *bona fides* of his statements.

The action was tried before Baron Huddleston and a special jury at Bury St. Edmunds, at the Summer Assizes, 1876.

The learned judge ruled that all the occasions were privileged, and the case went to the jury on the question of express malice.

In the course of his summing up the learned judge said: "Now in law if a man says what is not true, or writes what is libellous, or says what is slanderous of another, it is presumed that it is malicious. But where the occasion is privileged, then you require something more, and you require what the law calls express malice. I must tell you what express malice means."

And again, at the close of the summing up:—

"What you have to consider, then, is really and substantially this—assuming that these occasions were privileged, do you think that the defendant made those statements and wrote that letter *bona fide*, and in the honest belief that they were true—not merely that he believed them himself, but honestly believed them, which means that he had good grounds for believing them to be true. I do not mean to say pig-headedly, pertinaciously and obstinately perhaps persuaded himself of the matter for which he had no reasonable grounds, and of which you twelve gentlemen would say they were perfectly unjustified. If you think that under these circumstances Mr. Molyneux has taken himself out of the privilege in consequence of the statements not being made *bona fide* and in the honest belief they were true, and that therefore there is what in law is called malice in fact, which I have explained to you, then your verdict will be for the plaintiff."<sup>1</sup>

The jury found a verdict for the plaintiff, with £200 damages.

<sup>1</sup> The charge of the learned baron is abridged; the arguments of counsel and the concurring opinions of BRAMWELL and COTTON, L.JJ., are omitted. — ED.

These passages and the general tenor of the summing up, which was to the same effect, constituted the misdirection complained of.

The defendant moved for a new trial in the Queen's Bench Division, on the ground of misdirection, and that the verdict was against evidence; but the court refused the rule. The defendant appealed.

*Willis and Anderson* for the defendant.

*Philbrick and Cuffe*, for the plaintiff.

BRET, L. J. I am of the same opinion; I think that there was, what amounts in law to a misdirection; that the verdict was against the evidence; and, further, that there was no evidence to go to the jury.

With regard to the alleged misdirection, I do not think that we differ from the Queen's Bench Division in our view of the law, but I think that, whatever the idea Baron Huddleston intended to convey to the jury in his careful, elaborate, and, if I may say so, able summing up, really was, it may have materially misled them, and if it may, that is in law a misdirection.

The summing up is founded on the assumption that the occasions of the alleged slanders and libel were privileged, and that the defendant was therefore excused in that which would otherwise have been actionable, if he used the occasions fairly. Now it is right before criticising the summing up of the learned judge to state, as clearly as one can, what the law relating to excuse by reason of privilege in cases of libel and slander really is. It is, I apprehend, this: When a defendant claims that the occasion of a libel or slander is privileged, and when it is held by the judge, whose duty it is to decide the matter, that the occasion is privileged, the question arises, — under what conditions can the defendant take advantage of the privilege? If the occasion is privileged, it is so for some reason, and the defendant is entitled to the protection of the privilege if he uses the occasion for that reason, but not otherwise. If he uses the occasion for an indirect reason or motive, he uses it, not for the reason which makes it privileged, but for another. One, but by no means the only, indirect motive which can be alleged, is the gratification of some anger or malice of his own. By malice here I mean, not a pleading expression, but actual malice, or what is termed malice in fact, *i. e.*, a wrong feeling in the defendant's mind. If this malice be the indirect and wrong motive suggested in a particular case, there are certain tests by which its existence may be investigated. Two such tests are these: If a man is proved to have stated what he knew to be false, no one inquires further, everybody assumes thenceforth that he was malicious, that he did so wrong a thing from some wrong motive. Again, if it be proved that out of anger or from some other wrong motive the defendant has stated something as a truth or as true, without knowing or inquiring whether it was true or not, therefore reckless, by reason of his anger or other motive, whether it is true or not, the jury may infer, and generally will infer, that he used the occasion for the gratification of his anger or malice, or

other indirect motive, and not for the reason or motive which occasions or justifies the privilege.

These tests have been suggested before, and they were approved by the whole Court of Common Pleas in a case tried before me at Leeds, and I apprehend they are correct.

That being so, I think that Baron Huddleston did not follow these rules and tests, but others. Take his summing up as a whole, as I think we ought, he left the case as if the burden of proving there was no malice lay on the defendant, but if the occasion be privileged, the *onus* of showing malice is at once thrown on the plaintiff. Further, in order to guide the jury as to what malice was, he read the passage in *Bromage v. Prosser*; what he read there is not a definition of malice, in fact, at all, but of that malice which is a technical term in certain pleadings, where it simply means "wilfully." It has been held, that in such pleadings the absence of the word maliciously is immaterial if the word wilfully is present—because they are in such pleadings synonymous terms. Then, I think the passage at the end of the summing up is really a recapitulation of the sense of the whole summing up, and might lead the jury to believe that, although they were of opinion that the defendant did believe what he stated, he would not be protected unless his belief was a reasonable one, as distinguished from a pig-headed, obstinate, and insensible one. But the real question, as I have stated, is, whether the defendant did, in fact, believe his statement, or whether being angry or moved by some other indirect motive, did not know, and did not care, whether his statement was true or false. Questions of pig-headedness and obstinacy may be tests as to whether a man really did honestly believe or not, but Baron Huddleston left them as if they were of the essence of the definition of malice.

The direction was therefore wrong if the occasions were privileged. That they were I have a very strong opinion. The only occasion disputed is that of the communication to Mr. Green the curate. I am clearly of opinion that that was privileged. I think that where a clergyman consults his curate as to his conduct in an ecclesiastical matter, the occasion is a privileged one.

As to the other points, I think that at least the verdict was against the evidence. But I think more, I think there was no evidence fit to be submitted to a jury, and, therefore, if on a new trial the facts remain the same, the judge's duty will be to direct the jury that there is no case. In this matter, therefore, there has been a miscarriage. But I think that the case is not one in which to apply Order XL., rule 10, and enter the verdict for the defendant, as it does not follow that on a new trial further evidence may not be forthcoming.

*Appeal allowed.*

## CARPENTER v. BAILEY.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1873.

[Reported in 53 New Hampshire Reports, 590.]

THIS is an action on the case for a libel, by J. N. Carpenter against J. H. Bailey, the writ bearing date September 21, 1869.<sup>1</sup> The declaration alleges, that, on April 20, 1869, the plaintiff was a paymaster in the navy, stationed as purchasing agent at Portsmouth; that, by the rules of the navy department, he was entitled to remain on that station three years; and that the defendant, contriving, &c., published of him the following libel: "To the Honorable the Senators and Members of the House of Representatives in Congress from New Hampshire: The undersigned, after much patience has been exhausted, beg to remonstrate against the further continuance at this station of Paymaster J. N. Carpenter as purchasing agent. In all our struggles, Paymaster Carpenter has always voted against us, carrying the straight Democratic ticket, throwing his patronage adversely to the friends of General Grant, and always filling the requirements of a tool sent here by ex-Secretary Welles to carry out the interests of Andrew Johnson. May we hope for relief from such a burden? Let the rebel sympathizer be exchanged for a man who will have office hours of a convenient kind, and will be found there *at least once a day* to attend to those having business there, and officers and citizens will alike be grateful. Portsmouth, N. H., April 20, 1869. E. G. Peirce, Jr., Chas. Robinson, Aaron Young, Daniel J. Vaughan, E. A. Stevens, W. H. Hackett, John H. Bailey, Paine Durkee."

"The defendant pleaded in substance that he believed that the public good, and the welfare of said administration of General Grant, required that the said plaintiff should be removed from said office at said station, and that a suitable officer should be put there in his stead, and that the senators and members of the House of Representatives in Congress from the State of New Hampshire were the proper persons and officers to be petitioned in order to procure the removal of the said plaintiff from said office at said naval station, the defendant, in good faith, and without malice or ill-will to the said plaintiff, but in order to procure the removal of the plaintiff for the causes aforesaid from the said office, signed said petition to said senators and representatives containing said supposed libellous words in the plaintiff's declaration mentioned, as he lawfully might have done, for the cause aforesaid, and this he is ready to verify." Wherefore, &c.

To this plea the plaintiff demurred generally.

*Small* and *Frink*, for the defendant.

*Hatch*, for the plaintiff.

<sup>1</sup> The case is materially abridged. — ED.

SARGENT, C. J. If the defendant cannot justify by showing the truth of the matter charged, he may excuse the publication by showing that it was made upon a lawful occasion, upon probable cause, and from good motives.

It is also said that matter in excuse in a prosecution for libel is where the defendant, upon a lawful occasion, proceeded with good motives upon probable grounds, — that is, upon reasons that were apparently good, but upon a supposition which turns out to be unfounded. This is a very different thing from showing the actual truth of the allegations: where that is proved with a proper occasion, it is a justification without regard to motives; but where the statements made prove false, the defendant needs to show not only a proper occasion, but a good motive also, — for, if the matter be untrue and the motive bad, how could the end be justified or even excused? But when the occasion is proper, one may be excused for stating what proves to be untrue, if he had probable cause to believe it true, and spoke it from good motives; see authorities, 9 N. H. 45.

So, in *Palmer v. Concord*,<sup>1</sup> it is said, by Smith, J., that most of what are called “privileged communications” are conditionally, not absolutely, privileged. The question is one of good faith, or motive, and can be settled only by a jury. A court cannot rule that a communication is privileged, without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth; — and see cases cited.

In the case before us, the occasion would be a lawful one, provided the motive was good, and there was probable cause. And the question is, whether the mere fact, that the defendant had been informed and believed that a fact was so, is equivalent to having probable cause to believe it to be so. And we think it could not be assumed that it was so. A person might be informed of a fact by one in whom he might, for some special reason, have confidence, but to whom no one else would give the slightest credence; and a jury would readily find that a belief in that case was founded upon information which would not amount to probable cause for the belief of any man of ordinary capacity. The question for the jury would be, not whether the defendant believed it, but had he probable cause to believe it? There might be belief without probable cause for it; and hence it would not be sufficient to allege merely information and belief, because that might not, in a given case, amount to probable cause. The fourth plea is substantially correct in form, and goes as far as the rule thus laid down will warrant; and we think this third plea is insufficient. *Demurrer sustained.*

<sup>1</sup> 48 N. H. 217.

## CHAPTER IV.

## MALICIOUS PROSECUTION.

## SECTION I.

*Malicious Prosecution of Criminal Proceeding.*

## (a) PREVIOUS TERMINATION OF THE PROSECUTION.

## FISHER v. BRISTOW AND OTHERS.

IN THE KING'S BENCH, JUNE 15, 1779.

[Reported in 1 Douglas, 215.]

ACTION for a malicious presentment (for incest), in the ecclesiastical court of the archdeaconery of Huntingdon. Demurrer to the declaration and cause assigned, that it was not stated how the prosecution was disposed of, or that it was not still depending. The court were clearly of opinion, that the objection was fatal, and said it was settled, that the plaintiff in such an action, must show the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

*Judgment for the defendants.*<sup>1</sup>

<sup>1</sup> Parker v. Langley, 10 Mod. 210; Whitworth v. Hall, 2 B. & Ad. 695; Mellor v. Baddeley, 2 Cr. & M. 675; Watkins v. Lee, 5 M. & W. 270; McCann v. Preneveau, 10 Ont. 573; Poitras v. Le Beau, 14 Can. S. C. 742; Stewart v. Sonneborn, 98 U. S. 187; Steel v. Williams, 18 Ind. 161; West v. Hayes, 104 Ind. 251; Olson v. Neal, 63 Iowa, 214; Wood v. Laycock, 3 Met. (Ky.) 192; Hamilburgh v. Shepard, 119 Mass. 30; Pixley v. Reed, 26 Minn. 60; Lowe v. Wartman, 47 N. J. 413; Clark v. Cleveland, 6 Hill, 344; Searll v. McCracken, 16 How. Pr. 262; Swartout v. Dickelman, 12 Hun, 358; Johnson v. Finch, 93 N. Ca. 205; Forster v. Orr, 17 Oreg. 447 Accord.

Consequently, the Statute of Limitations does not run until the prosecution is terminated. Mayor v. Hall, 12 Can. S. C. 74; Printup v. Smith, 74 Ga. 157. — Ed.



## STEWART v. GROMETT.

IN THE COMMON PLEAS, NOVEMBER 11, 1859.

[Reported in 7 Common Bench Reports, New Series, 191.]

ERLE, C. J.<sup>1</sup> I am of opinion that our judgment in this case must be for the plaintiff. It is an action against the defendant for falsely and maliciously, and without reasonable or probable cause, making information on oath before a magistrate that the plaintiff had used threatening language to him, whereby he went in fear of bodily harm, and so procuring a warrant under which the plaintiff was incarcerated in the castle at Swaffham, for want of sureties, for a period of six months. It is admitted on the pleadings that the defendant did falsely and maliciously, and without reasonable or probable cause, procure that wrong to be done to the plaintiff; and the question is whether the declaration shows enough to entitle the plaintiff to maintain an action for that wrong. This is in some sort an action for a malicious prosecution; and it has been contended by Mr. Couch, for the defendant, that the case falls within the ordinary rule applicable to such actions, that the plaintiff must show that the proceeding terminated in his favor, and that no action lies where they are shown to have terminated against the accused. But I am of opinion that the distinction taken by Mr. Keane removes that objection, and shows that that rule does not apply to this case, because the proceeding before the magistrate being founded upon a statement which the party charged is not at liberty to controvert, is an *ex parte* proceeding, and, although it attains the result which is sought, it is not a judgment, but is in the nature of a writ of process. It is not like the case of an application to a magistrate upon a matter on which he is to exercise his discretion: there, the injury sustained by the party is the act of the law, and therefore no action lies unless the person who sets the magistrate in motion is actuated by malice. But here the law was directly put in motion by the defendant against the plaintiff, and, it must be assumed, falsely and maliciously and without reasonable or probable cause. If a party goes before a judge, under the 1 & 2 Vict. c. 110, with an affidavit of debt for the purpose of procuring a *capias* to arrest his debtor, upon a suggestion that he is going abroad, and that is done falsely and maliciously, and without reasonable or probable cause, an action lies. So, if a party go to the Court of Queen's Bench, and maliciously exhibit articles of the peace against another, supported by a false oath that such other had used threats against him, his statement being incontrovertible, it is clear to my mind that an action would lie. Can it make any difference that here the proceeding took place before a magistrate? It seems to me that the two proceedings are quite analogous: the same remedy is sought, only by a differ-

<sup>1</sup> Only the opinion of ERLE, C. J., is given — ED.

ent mode. As in the one case the truth of the articles cannot be controverted, so in the other the statement made before the magistrate upon oath cannot be contradicted by the accused. There is not the least sign of authority to show that the magistrate had any discretion, so that the plaintiff might have had a decision in his favor. In Burn's Justice, sureties of the peace are treated as being subject to precisely the same rule as articles of the peace at the sessions or in the Court of Queen's Bench, in respect of their truth being incontrovertible. And there is strong reason for assuming that to be the true state of the law; the fact of there being no authority exactly in point as to sureties of the peace, may well be accounted for by supposing that no one has entertained doubt enough upon it to take the opinion of any court. But as far as authority goes, *The King v. Doherty*,<sup>1</sup> and *Venafrá v. Johnson*,<sup>2</sup> are in favor of the plaintiff. In the latter case, Johnson made precisely the same application to the justices as was made here, and they exercised a precisely analogous jurisdiction, the only difference being that there the magistrates held the plaintiff to bail for his appearance at the sessions, whereas here the magistrate at once committed the plaintiff to jail until he should find the required sureties: and it was there decided by implication that the proceeding before the magistrate was incontrovertible; for, the court held that the judge was wrong in not leaving it to the jury to say whether or not the defendant believed the menaces when he put the law in motion against the plaintiff. If Mr. Couch's argument to-day is right, the counsel and the court in that case were all wrong. Upon principle, therefore, and upon authority, it seems to me that the argument for the plaintiff in this case ought to prevail.

*Judgment for the plaintiff.*<sup>3</sup>

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BASEBÉ v. MATTHEWS AND WIFE.

IN THE COMMON PLEAS, MAY 14, 1867.

[Reported in *Law Reports*, 2 *Common Pleas*, 684.]

THE declaration stated that the defendant Ellen falsely and maliciously, and without reasonable and probable cause, appeared before a justice of the peace, and charged the plaintiff with assaulting and beating her, contrary to the statute, and by false, scandalous, and malicious statements then made by the said Ellen before the justice, and without any reasonable and probable cause, caused the justice wrongfully to convict the plaintiff of the supposed offence, and to adjudge that he should pay a fine of 40s., and £1 5s. 6d. for costs, which said fine and

<sup>1</sup> 13 East, 171.

<sup>2</sup> 10 Bing. 301, 3 M. & Scott, 847.

<sup>3</sup> *Hyde v. Greuch*, 62 Md. 577; *Pixley v. Reed*, 26 Minn. 80 (*semble*); *Apgar v. Woolston*, 43 N. J. 57, 65 (*semble*); *Bump v. Betts*, 19 Wend. 421; *Fortman v. Rottier*, 8 Oh. St. 548 *Accord.* — ED.

costs the plaintiff was compelled to pay, *there being no appeal from the said conviction*; and that, by reason of the premises, the plaintiff had been injured in his reputation, and put to expense, &c.

Demurrer, on the ground that no action lies for a malicious prosecution, unless the prosecution has failed. Joinder.

*Berresford* appeared to support the demurrer; but the court called upon

*C. C. Wood* to support the declaration. The declaration charges that this person by false and malicious statements induced the magistrates to convict the plaintiff of an assault, and that he had no power to appeal against the conviction; and that is admitted by the demurrer. In no case yet has such a declaration been held not to be sufficient. In *Mellor v. Baddeley*<sup>1</sup> there was an opportunity of appealing; and this is relied on by the court in giving judgment.

The observations of the judges in *Steward v. Gromett* are also strongly in favor of the view now presented.<sup>2</sup>

BYLES, J. I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favor of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg v. Blake*,<sup>3</sup> where Hale, C. J., says, that, "if such an action should be allowed," — that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, — "the judgment would be blown off by a side-wind."

KEATING, J. I am entirely of the same opinion.

MONTAGUE SMITH, J. I am of the same opinion. In *Castrique v. Behrens*,<sup>4</sup> which was an action for conspiring with certain persons fraudulently and unlawfully to procure an attachment and condemnation of a ship by a proceeding *in rem* in a foreign court, Crompton, J., in delivering the judgment of the court, says: "There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause, setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so, without actual legal damage: *Cotterell v. Jones*,<sup>5</sup> *Barber v. Lesiter*.<sup>6</sup> But, in such an action, it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favor of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal,

<sup>1</sup> 2 C. & M. 675, 678.

<sup>2</sup> The argument for the plaintiff is abridged. — Ed.

<sup>3</sup> Hardr. 194.

<sup>4</sup> 3 E. & E. 709, 721.

<sup>5</sup> 11 C. B. 713.

<sup>6</sup> 7 C. B. N. S. 175; 29 L. J. C. P. 161.

to hold that the decision was come to without reasonable and probable cause." The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a court of appeal in a matter in which the Legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action.

*Judgment for the defendants.*

### SAMUEL PARKER v. GEORGE F. FARLEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1852.

[Reported in 10 Cushing, 279.]

ACTION on the case for a malicious prosecution.

1. It was contended by the counsel for the defendant, that a termination of the suit, complained of as malicious, and without probable cause, by a *nolle prosequi*, was not such an acquittal or determination of the suit as would enable the plaintiff to maintain this action.

2. That the conviction of the plaintiff by the jury in 1845, was, in point of law, proof of probable cause. The court expressed an opinion favorable to the defendant on both points; whereupon a verdict was taken by consent for the defendant, subject to the opinion of the whole court, on these questions of law.<sup>1</sup>

*B. F. Butler*, for the plaintiff.

*J. G. Abbott*, for the defendant.

SHAW, C. J. Upon the first point, the court are of opinion, that, according to a well-settled series of authorities, a plaintiff cannot maintain an action for a malicious criminal prosecution by indictment, by showing that the prosecution has been determined by a *nolle prosequi*.<sup>2</sup> This point has been so recently under the consideration of the court, in the case of *Bacon v. Towne*,<sup>3</sup> that it seems sufficient to refer to that case, and the authorities there cited. It was said in the argument of

<sup>1</sup> The statement of the case is abridged. — Ed.

<sup>2</sup> *Goddard v. Smith*, 6 Mod. 261, 1 Salk. 21, 2 Salk. 456, 3 Salk. 245, s. c. (*semble*); *Garing v. Fraser*, 76 Me. 37 (*semble*); *Bacon v. Towne*, 4 Cush. 217 (*semble*); *Brown v. Lakeman*, 12 Cush. 482 (*semble*); *Cardinal v. Smith*, 109 Mass. 158 (*semble*); *Smith v. Shackelford*, 1 N. & McC. 36 (*semble*) *Accord.* But in later cases — *Graves v. Dawson*, 130 Mass. 78, 133 Mass. 419; *Langford v. Boston Co.*, 144 Mass. 431 — the Massachusetts court has receded from the opinion of Shaw, C. J., and has closely approached the doctrine of *Brown v. Randall*, *infra*, 545. See also *Sayles v. Briggs*, 4 Met. 421, 426; *Bacon v. Waters*, 2 All. 400; *Moyle v. Drake*, 141 Mass. 238. — Ed.

<sup>3</sup> 4 Cush. 217.

the present case, that what was then said was an *obiter dictum*, and not a judicial determination of any question then in controversy. It is true, that it was not necessary to the decision of the defendant's motion for a new trial, because the point had been decided in his favor on the trial, and excluded the plaintiff from recovering on two of his counts. But as the court had concluded to order a new trial on other points, and on such trial this point would present itself again *in limine*, it seemed to require the expression of an opinion by the court.

Were this a new and original question, to be decided upon principle, it might be doubted whether it would be just and wise to establish this as an inflexible rule of practice, because perhaps cases may be imagined, as where a party indicted has been long kept in court, always desirous and ready for a trial, and when a *nolle prosequi* is entered without his consent and against his remonstrance, where he ought not to be deprived of his right of showing that the suit was groundless and malicious. But the common law seems to have gone upon the ground, that before a party criminally prosecuted shall have a right to maintain an action and recover damages, against one who has acted as complainant in behalf of the commonwealth, and ostensibly for the public good, (an action certainly not to be favored,) he shall begin by offering a verdict in his favor, by a jury who have considered the cause on its merits. But even if it were now open to consider any such modified rule, we should be of opinion that it would not apply, when a *nolle prosequi* and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, by the party prosecuted. In the present case, it appears by the record, that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a *nolle prosequi*.

Upon the other point also, the court are of opinion, that this action cannot be maintained. The main question in such suit is, whether there was probable cause for the prosecution complained of as malicious. Malice may be inferred from the fact that the complaint was groundless, but not the reverse. Want of probable cause is not to be inferred even from proof of express malice. And whether there was probable cause or not, is a question of law upon facts admitted or uncontested, or the truth of which is to be ascertained by the jury on the evidence submitted to them. Now, in looking into the record in this case, we find that, upon a trial of the plaintiff on this indictment in the Court of Common Pleas, the only trial by jury which has been had in the case, they found him guilty. Exceptions were taken by the defendant, to the directions and rulings of the court in matter of law; but upon their reconsideration in this court, they were overruled. It was at this stage of the cause, when the plaintiff stood liable to be sentenced for the offence with which he was charged in the indictment, that he applied to this court for a new trial, which was granted, to admit newly discovered evidence. But such evidence was never brought before a jury, and no

new trial was ever had. The court are therefore of opinion, that such a verdict of conviction upon instructions correct in matter in law, though afterwards set aside for another cause, must be regarded as proof of probable cause for the prosecution, and stand as a bar to the prosecution of this suit.

*Judgment for the defendant.*

JOHN BROWN v. NEHEMIAH G. RANDALL AND ANOTHER.

IN THE SUPREME COURT, CONNECTICUT, MARCH TERM, 1869.

[*Reported in 36 Connecticut Reports, 56.*]

CARPENTER, J.<sup>1</sup> The defendants complained to a grandjuror of the town of Norwich against the plaintiff, charging him with a breach of the peace, and induced the grandjuror to enter a complaint to a magistrate in due form, whereupon a warrant was issued, and the plaintiff arrested and held to answer the complaint. After remaining in custody several hours, the magistrate informed the defendants and their counsel, who acted for the grandjuror, that he was ready to proceed with the trial. The defendants sent word to the court that they should prosecute the complaint no further, and thereupon the plaintiff was discharged. It is alleged in the declaration that this proceeding was malicious and without probable cause, and the jury have found that allegation to be true.

The important question in this case is whether, upon the facts alleged and proved, the plaintiff is entitled to recover. All the material averments seem to have been proved except the allegation of acquittal. That was not proved, and the court charged the jury that it was not necessary. The defendants complain of this, as they rely upon the non-existence of that fact as a complete defence to the action. Decisions of courts of the highest respectability, both in England and in this country, justify this claim. It does not appear that this question has ever been directly determined by this court. We are referred to the case of *Monroe v. Maples*.<sup>2</sup> But no such question arose in that case. It simply decided that a person convicted of the crime charged against him could not maintain the action. We are therefore at liberty to determine the question upon principle.

The grounds of this action are, the malice of the defendant, the want of probable cause, and an injury sustained by the plaintiff. 1 *Swift's Digest*, 491. The conviction of the plaintiff is justly considered as conclusive evidence of probable cause. The authorities referred to virtually decide — without sufficient reason as it seems to

<sup>1</sup> Everything is omitted, except the opinion of the court on the question of the termination of the prosecution. — Ed.

<sup>2</sup> 1 Root, 553.

us — that the termination of the prosecution by a *nolle prosequi*, or abandonment, was equally conclusive upon that question.

One reason given for this is, that no termination of the prosecution in favor of the accused short of an acquittal will discharge the crime or be a bar to a new indictment. This reasoning is not satisfactory. The possibility that the plaintiff may be again prosecuted for the same alleged offence is not inconsistent with an entire want of probable cause in the first prosecution. This reason seems to have been disregarded in *Sayles v. Briggs*.<sup>1</sup> The complainant abandoned the prosecution against the plaintiff after a trial, and the magistrate, who could only bind over or discharge the person accused, discharged him. The court held that the action could be maintained. Yet such a discharge could be no bar to a subsequent prosecution.

Another reason given is, that the common law will not favor actions in behalf of a party criminally prosecuted against one who has acted as complainant in behalf of the public, and ostensibly for the public good; it therefore requires that the plaintiff in such an action shall begin by offering the verdict of a jury who have considered the cause on its merits. This may be a very proper caution to a jury, and a matter which ought to be considered by them in weighing evidence, but we see no sufficient reason for adopting it as an absolute rule of law, the effect of which is, in some cases at least, to shut out the truth. No such rule has been adopted in this State, and we think it is contrary to the prevailing notions of the profession. Judge Swift, in his Digest, vol. 1, p. 491, states five different modes of terminating a prosecution in favor of the accused which will lay the foundation for this action, and one of them is, "when the prosecution has been abandoned and given up."

In *Parker v. Farley*, Shaw, C. J., in speaking of the rule under consideration, says: "Were this a new and original question, to be decided upon principle, it might be doubted whether it would be just and wise to establish this as an inflexible rule of practice."

( On the whole we think it wise and safe, when a prosecution has been abandoned, as this was, without any arrangement with the accused, and without any request from him that it should be so abandoned, to leave the question of probable cause to the jury. )

The charge of the court was in harmony with these views, and we do not advise a new trial.

In this opinion the other judges concurred.<sup>2</sup>

<sup>1</sup> 4 Met. 421.

<sup>2</sup> *Cotton v. Wilson*, Minor, 203; *Chapman v. Woods*, 6 Blackf. 504; *Richter v. Castner*, 45 Ind. 444; *Coffey v. Myers*, 84 Ind. 105; *Kelley v. Sage*, 12 Kans. 109; *Bell v. Matthews*, 37 Kans. 686; *Yocum v. Polly*, 1 B. Mon. 358; *Stanton v. Hart*, 27 Mich. 539; *Swensgaard v. Davis*, 33 Minn. 368 (*semble*); *Kennedy v. Holladay*, 25 Mo. Ap. 503; *Casebeer v. Drahoble*, 13 Neb. 465; *Casebeer v. Rice*, 18 Neb. 205; *Apgar v. Woolston*, 43 N. J. 57; *Lowe v. Wartman*, 47 N. J. 413; *Clark v. Cleveland*, 6 Hill, 344 (*semble*); *Moulton v. Beecher*, 8 Hun, 100; *Fay v. O'Neill*, 36 N. Y. 11 (*semble*); *Murray v. Lackey*, 2 Murph. 368; *Rice v. Ponder*, 7 Ired. 390; *Hatch v.*

Cohen, 84 N. Ca. 602 ; *Murphy v. Moore* (Pa. 1887), 11 Atl. R. 665 ; *Driggs v. Burton*, 44 Vt. 124 ; *Woodworth v. Mills*, 61 Wis. 44 ; *McCrosson v. Cummings*, 5 Haw. 391 *Accord*.

TERMINATION OF A PREVIOUS CIVIL ACTION. — If a party sues for a malicious arrest or seizure of property in a civil action, a voluntary abandonment of the latter action by the plaintiff therein is equivalent to its termination in favor of his adversary. *Arundell v. White*, 14 East, 216 ; *Nicholson v. Coghill*, 4 B. & C. 21 ; *Pierce v. Street*, 3 B. & Ad. 397 ; *Watkins v. Lee*, 5 M. & W. 270 ; *Ross v. Norman*, 5 Ex. 359 ; *Emery v. Ginman*, 24 Ill. Ap. 65 ; *Cardinal v. Smith*, 109 Mass. 158 ; *Mayer v. Walter*, 64 Pa. 286.

The rule is the same as to malicious prosecutions of civil actions without arrest or attachment in jurisdictions where one is allowed to sue for malicious prosecution of a civil action, without more. *Wall v. Toomey*, 52 Conn. 35 ; *Marbourg v. Smith*, 11 Kans. 554 ; *Mitchell v. Sullivan*, 30 Kans. 231.

But an abandonment of the previous proceeding, brought about as a compromise, is not a termination in favor of the original defendant. *Wilkinson v. Howell*, M. & M. 495 ; *Kinley v. Wallace*, 36 Cal. 462 (*semble*) ; *Emery v. Ginman*, 24 Ill. Ap. 65 ; *Fadner v. Filer*, 27 Ill. Ap. 506 ; *Marks v. Gray*, 42 Me. 86 ; *Sartwell v. Parker*, 141 Mass. 405 ; *Rachelman v. Skinner*, 46 Minn. 191 ; *McCormick v. Sisson*, 7 Cow. 715 ; *Gallagher v. Stoddard*, 47 Hun, 101 ; *Clark v. Everest*, 2 Grant (Pa.), 416 ; *Mayer v. Walter*, 64 Pa. 283, 287 ; *Rounds v. Humes*, 7 R. I. 535. Unless the settlement was obtained by duress of the person or the goods of the original defendant. *Morton v. Young*, 55 Me. 24. — ED.



SECTION I. (*continued*).

## (b) WANT OF PROBABLE CAUSE.

## FOSHAY v. FERGUSON.

IN THE SUPREME COURT, NEW YORK, MAY, 1846.

[Reported in 2 Denio, 617.]

*By the Court*, BRONSON, C. J.<sup>1</sup> There was evidence enough in the case to warrant the jury in finding, that the defendant set the prosecution in motion from a bad motive. But all the books agree, that proof of express malice is not enough, without showing also the want of probable cause. Probable cause has been defined, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. *Munns v. Nemours*.<sup>2</sup> However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show, that he had reasonable grounds for believing him guilty at the time the charge was made. In *Swain v. Stafford*,<sup>3</sup> the action was brought against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made, the defendant had received such information as induced a belief of the plaintiff's guilt; and although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported. The doctrine that probable cause depends on the knowledge or information which the prosecutor had at the time the charge was made, has been carried to a great length. In *Delegal v. Highley*,<sup>4</sup> which was an action for maliciously, and without probable cause, procuring a third person to charge the plaintiff with a criminal offence, the defendant pleaded specially, showing that the plaintiff was guilty of the offence which had been laid to his charge; and the plea was held bad in substance, because it did not show that the defendant, at the time the charge was made, had been informed, or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocence of the accused; but upon the belief of the prosecutor concerning such guilt or innocence. *Seibert v. Price*.<sup>5</sup>

Without going into a particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before

<sup>1</sup> Only the opinion of the court is given. — Ed.

<sup>2</sup> 3 Wash. C. C. 37.

<sup>3</sup> 3 Iredell, N. Car. 289, and 4 id. 392.

<sup>4</sup> 3 Bing. N. C. 950.

<sup>5</sup> 5 Watts & Serg. 438.

the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle: and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action, if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offence. If the parties intended the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that he made no complaint until the plaintiff commenced the two suits against him, goes far to show that he was obnoxious to that charge; and that he was governed more by his own interest, than by a proper regard to the cause of public justice. But however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and so long as it exists, it is a complete defence. There is enough in the defendant's conduct to induce a rigid scrutiny of the defence. But if upon such scrutiny it appear, that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported.

On a careful examination of the case, I am of opinion that the verdict was clearly wrong. But as the charge of the judge is not given, we must presume that the case was properly submitted to the jury; and a new trial can therefore only be had on payment of costs.

*Ordered accordingly.*<sup>1</sup>

<sup>1</sup> Anon. 6 Mod. 73; Turner v. Ambler, 10 Q. B. 252; Hailes v. Marks, 7 H. & N. 56; Wheeler v. Nesbitt, 24 How. 544, 550; Stewart v. Sonneborn, 98 U. S. 187; Sanders v. Palmer, 55 Fed. Rep. 217; Jordan v. Alabama Co., 81 Ala. 220; Marable v. Mayer, 78 Ga. 710; Joiner v. Ocean Co., 86 Ga. 238; Ames v. Snider, 69 Ill. 376; Barrett v. Spaid, 70 Ill. 408; Leyenberger v. Paul, 12 Ill. Ap. 635; Morrell v. Martin, 17 Ill. Ap. 336; Adams v. Lisher, 3 Blackf. 241; Green v. Cochran, 43 Iowa, 544; Yocum v. Polly, 1 B. Mon. 358; Medcalfe v. Brooklyn Co., 45 Md. 198; Flickinger v. Wagner, 46 Md. 580; Stone v. Crocker, 24 Pick. 81; Coupal v. Ward, 106 Mass. 289; Hamilton v. Smith, 39 Mich. 222; Smith v. Austin, 49 Mich. 286; Webster v. Fowler, 89 Mich. 303; Burris v. North, 64 Mo. 426; Renfro v. Prior, 22 Mo. Ap. 403; Kennedy v. Holladay, 25 Mo. Ap. 503, 519; Woodman v. Prescott, 65 N. H. 224; Heyne v. Blair, 62 N. Y. 19; Miller v. Milligan, 48 Barb. 30; Dietz v. Langfitt, 63 Pa. 234; Emerson v. Cochran, 111 Pa. 619; Bartlett v. Brown, 6 R. I. 37; Welch v. Boston Co., 14 R. I. 609; Stoddard v. Roland, 31 S. Ca. 342; Kelton v. Bevins, Cooke (Tenn.), 90; Evans v. Thompson, 12 Heisk. 534; Johnson v. State (Texas, 1893), 22 S. W. R. 43; South Bank v. Suffolk Bank, 27 Vt. 505 *Accord.* — ED.

## SAMUEL CLOON v. ELBRIDGE GERRY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE, 1859

[Reported in 13 Gray, 201.]

SHAW, C. J.<sup>1</sup> In an action for a malicious prosecution against one, in the name of the Commonwealth, the averment on the part of the plaintiff, that the complaint was made without reasonable cause, lies at the foundation of the suit; and although it is in form a negative proposition, it is incumbent on the plaintiff to establish it by satisfactory proof. This kind of suit, by which the complainant in a criminal prosecution is made liable to an action for damages, at the suit of the person complained of, is not to be favored; it has a tendency to deter men who know of breaches of the law, from prosecuting offenders, thereby endangering the order and peace of the community. Absence of probable cause is essential; from want of probable cause, malice may be inferred; but from malice, even if express, want of probable cause cannot be inferred.

(An ultimate acquittal of the offence charged, though necessary to be proved, is but a short step towards the maintenance of an action for malicious prosecution. Malice, and absence of any reasonable and probable cause, must also concur with an acquittal.)

In the present case, the prosecution complained of was a complaint before a justice of the peace by whom the plaintiff was convicted; from this judgment he appealed, and on trial in the Court of Common Pleas was acquitted.

On the trial, it appeared from the pleadings and evidence, and was admitted, that the complaint was for an offence which the magistrate had, by law, jurisdiction to hear, decide and render a judgment in; also, that neither in the trial before the magistrate, nor in the trial in the Common Pleas, was the defendant a witness. On this case, the court ruled that such a conviction was proof of probable cause; or, to state the proposition with more precision, it negatived the plaintiff's leading and essential averment that the complaint was made without reasonable and probable cause, and that, for this reason, the action could not be maintained, and thereupon ordered a nonsuit.

The court are of opinion that this direction was right. The question of reasonable and probable cause, when the facts are not contested, is a question of law. And when the plaintiff had been convicted by a tribunal, constituted by law, with authority to render a judgment, which, if not appealed from, would have been conclusive of his guilt, and such judgment is not impeached on the ground of fraud, conspiracy or subornation in its procurement, although afterwards reversed on another trial, it constitutes sufficient proof that the prosecution was

<sup>1</sup> Only the opinion of the court is given. — ED.

not groundless, and to defeat an action for malicious prosecution. The case of *Whitney v. Peckham*<sup>1</sup> is directly in point, and we think it is well sustained by authorities.

It is said that the question of probable cause is a mixed question of law and fact, and that the facts should have been left to the jury. Here no fact material to the question was controverted, and then there was nothing to leave to a jury.

*Exceptions overruled.*<sup>2</sup>

<sup>1</sup> 15 Mass. 243.

<sup>2</sup> CONVICTION REVERSED. — It is generally agreed that a conviction of the defendant in the criminal proceeding, although subsequently reversed, negatives the absence of probable cause, unless it is also made to appear that the conviction was procured by the fraud of the instigator of the criminal proceeding. Accordingly, a declaration alleging the conviction and its reversal, but not alleging any such fraud, is bad on demurrer. *Reynolds v. Kennedy*, 1 Wils. 232; *Crescent Co. v. Butcher's Co.*, 120 U. S. 141; *Goodrich v. Warner*, 21 Conn. 432 (*semble*); *Adams v. Bicknell*, 126 Ind. 210; *Moffatt v. Fisher*, 47 Iowa, 473; *Bowman v. Brown*, 52 Iowa, 437; *Olson v. Neal*, 63 Iowa, 214; *Spring v. Beson*, 12 B. Mon. 551; *Witham v. Gower*, 14 Me. 362; *Paxson v. Caswell*, 22 Me. 212; *Whitney v. Peckham*, 15 Mass. 243; *Phillips v. Kalamazoo*, 58 Mich. 33 (see *Spalding v. Lowe*, 56 Mich. 366); *Boogher v. Hough*, 99 Mo. 183; *Burt v. Place*, 4 Wend. 591; *Palmer v. Avery*, 41 Barb. 290; *Herman v. Brookerhoff*, 8 Watts, 240 (*semble*); *Welch v. Boston Co.*, 14 R. I. 609.

In a few jurisdictions the conviction, although set aside, is treated as conclusive evidence of probable cause, proof of fraud in its procurement being inadmissible. *Clements v. Odorless Co.*, 67 Md. 461, 605 (Bryan, J., diss.); *Parker v. Huntington*, 7 Gray, 36; *Griffin v. Sellars*, 4 Dev. & B. 176.

In Virginia, on the contrary, a count alleging a conviction and its reversal is sufficient without any allegation in regard to fraud. *Jones v. Finch*, 84 Va. 204 (*semble*); *Blanks v. Robinson*, Va. L. J. (1886) 398 (overruling *Womack v. Circle*, 32 Grat. 324). See *Hale v. Boylen*, 22 W. Va. 234.

COMMITMENT FOR GRAND JURY. — The holding of the defendant for the grand jury is *prima facie* evidence of probable cause. *Miller v. Chicago Co.*, 41 Fed. R. 898; *Ewing v. Sanford*, 19 Ala. 605; *Ganea v. Southern Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287; *Ritchey v. Davis*, 11 Iowa, 124; *Ross v. Hixon*, 46 Kans. 550; *Ricord v. Central Co.*, 15 Nev. 167; *Ash v. Marlow*, 20 Ohio, 119; *Raleigh v. Cook*, 60 Tex. 438; *Hale v. Boylen*, 22 W. Va. 234.

FINDING OF INDICTMENT. — The finding of an indictment is *prima facie* evidence of probable cause. *Sharpe v. Johnston*, 76 Mo. 660; *Peck v. Chouteau*, 91 Mo. 138.

FAILURE OF THE PROSECUTION. — The failure of the original prosecution is in some jurisdictions regarded as *prima facie* evidence of the absence of probable cause. *Miller v. Chicago Co.*, 41 Fed. R. 898, 901; *Straus v. Young*, 36 Md. 246; *Whitfield v. Westbrook*, 40 Miss. 311; *Bostick v. Rutherford*, 4 Hawks, 83; *Jones v. Finch*, 84 Va. 204. In others there is no such presumption. *Stewart v. Sonneborn*, 98 U. S. 187, 195; *Skidmore v. Bricker*, 77 Ill. 164; *Williams v. Van Meter*, 8 Mo. 339; *Boeger v. Langenberg*, 97 Mo. 390. — ED.

## RAVENGA v. MACKINTOSH.

IN THE KING'S BENCH, MAY 8, 1824.

[Reported in 2 Barnewall &amp; Cresswell, 693.]

THIS was an action for a malicious arrest: plea not guilty. At the trial before Abbott, C. J., at the London sittings after last Hilary term, the jury was directed to find a verdict for the defendant, if they were of opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his professional adviser, actually believing that Ravenga was personally liable, and that he might be lawfully arrested, and that he (Mackintosh) could recover in that action; but to find for the plaintiff, if they were of opinion that Mackintosh believed that he must fail in the action, and that he intended to use the opinion as a protection, in case the proceedings were afterwards called in question; and that he made the arrest, not with a view of obtaining his debt, but to compel the plaintiff to sanction the debentures. The jury found a verdict for the plaintiff, with £250 damages.<sup>1</sup>

The *Attorney-General* now moved for a new trial.

BAYLEY, J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description.<sup>2</sup> A party, how-

<sup>1</sup> The statement of the evidence, the argument for the defendant, and the concurring opinion of HOLROYD, J., are omitted. — Ed.

<sup>2</sup> *Snow v. Allen*, 1 Stark. 502; *Abrath v. North Eastern Co.*, 11 Q. B. Div. 440, 11 Ap. Cas. 247; *Seongall v. Stapleton*, 12 Ont. 206; *Stewart v. Sonneborn*, 98 U. S. 187; *Blunt v. Little*, 3 Mason, 102; *Cuthbert v. Calloway*, 35 Fed. R. 466 (*semble*); *Miller v. Chicago Co.*, 41 Fed. R. 898; *Coggsell v. Bohn*, 43 Fed. R. 411; *McLeod v. McLeod*, 73 Ala. 42; *Jordan v. Alabama Co.*, 81 Ala. 220; *Lemay v. Williams*, 32 Ark. 166; *Bliss v. Wyman*, 7 Cal. 257; *Jones v. Dowd*, 71 Cal. 89; *Joiner v. Ocean Co.*, 86 Ga. 238; *Ross v. Innis*, 26 Ill. 259; *Ames v. Snider*, 69 Ill. 376; *Barrett v. Spaid*, 70 Ill. 408; *Brown v. Smith*, 83 Ill. 291; *Roy v. Goings*, 112 Ill. 656; *Aldridge v. Churchill*, 28 Ind. 62; *Paddock v. Watts*, 116 Ind. 146; *Adams v. Bicknell*, 126 Ind. 210; *Mesher v. Iddings*, 72 Iowa, 553; *Schippel v. Norton*, 38 Kans. 567; *Stevens v. Fassett*, 27 Me. 266; *Soule v. Winslow*, 66 Me. 447; *Cooper v. Utterbach*, 37 Md. 282; *Hyde v. Greuch*, 62 Md. 577; *Stone v. Swift*, 4 Pick. 389; *Monaghan v. Cox*, 155 Mass. 487; *Stanton v. Hart*, 27 Mich. 539; *Perry v. Salier*, 92 Mich. 72; *Moore v. Northern Co.*, 37 Minn. 147; *Boyd v. Mendenhall* (Minn. 1893), 55 N. W. R. 45; *Alexander v. Harrison*, 38 Mo. 258; *Burris v. North*, 64 Mo. 426; *Whitfield v. Westbrook*, 40 Miss. 311; *Hall v. Snyder*, 6 Barb. 83; *Richardson v. Virtue*, 2 Hun, 208; *Turner v. Dinnegar*, 20 Hun, 465; *Beal v. Robeson*, 8 Ired. 276; *Ash v. Marlow*, 20 Ohio, 119; *Walter v. Sample*, 25 Pa. 275; *Smith v. Walter*, 125 Pa. 453; *Bartlett v. Brown*, 6 R. I. 37; *Kendrick v. Cypert*, 10 Humph. 291; *St. Johnsbury Co. v. Hunt*, 59 Vt. 294; *Forbes v. Hagman*, 75 Va. 168; *Sutton v. McConnell*, 46 Wis. 269.

But see *Brewer v. Jacobs*, 22 Fed. R. 217; *Ramsey v. Arrott*, 64 Tex. 320; *Glasgow*

ever, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted *bona fide* on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act *bona fide*, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

*Rule refused.*<sup>1</sup>

## HADDRICK v. HESLOP AND RAINE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1848.

[Reported in 12 *Queen's Bench Reports*, 267.]

CASE for maliciously and without reasonable and probable cause indicting the plaintiff for perjury. Averment that the plaintiff was tried and acquitted, and judgment given that he should depart without day, as by the record appeared, &c.

Plea, by Heslop: Not guilty. Issue thereon.

On the trial, before Wightman, J., at the Durham Summer Assizes, 1847, it was shown, on the part of the plaintiff, that the now defendant Heslop received the account of Haddrick's evidence from another party, and then stated that he would indict Haddrick for perjury; and that his informant thereupon expressed an opinion that there was no ground for such indictment; on which Heslop said that, even if there were not

*v. Owen*, 69 Tex. 167; *Shannon v. Jones*, 76 Tex. 141; Mr. Tiedeman's Note, 21 Am. L. Reg. N. S. 582.

The advice must be that of a lawyer, and not a layman. *Murphy v. Larson*, 77 Ill. 172; *McCullough v. Rice*, 59 Ind. 580; *Olmstead v. Partridge*, 16 Gray, 381; *Beal v. Robeson*, 8 Ired. 276. Even though the layman be a justice of the peace. *Coleman v. Henrick*, 2 Mack, 189; *Straus v. Young*, 36 Md. 246; *Monaghan v. Cox*, 155 Mass. 487 (*semble*); *Gee v. Culver*, 12 Oreg. 228; *Brobst v. Ruff*, 100 Pa. 91; *Sutton v. McConnell*, 46 Wis. 269. But see *Bell v. Rawles*, 93 Cal. 222; *Sisk v. Hurst*, 1 W. Va. 53. Compare *Mark v. Hastings* (Ala. 1893), 13 So. R. 297.

The lawyer must have no personal interest in the controversy. *White v. Cave*, 71 Me. 555.

In *Hazzard v. Flurry*, 120 N. Y. 223, the Court of Appeals (Second Division) held that mistaken advice of counsel upon a point of law would not justify the client, since every one is presumed to know the law. Surely that much-abused fiction has seldom been so glaringly perverted in behalf of injustice. — ED.

<sup>1</sup> *Vann v. McCreary*, 77 Cal. 434; *Boyd v. Mendenhall*, 112 Ill. 656; *Acton v. Coffman*, 74 Iowa, 17; *Johnson v. Miller*, 82 Iowa, 693; *Sharpe v. Johnston*, 76 Mo. 660; *Ames v. Rathbun*, 37 How. Pr. 289; *Laird v. Taylor*, 66 Barb. 139; *Davenport v. Lynch*, 6 Jones (N. Ca.) 545 *Accord*. — ED.

sufficient grounds for the indictment, it would tie up the mouths of Hinde and Haddrick for a time, and that he would move for a new trial. No witnesses were called for the defence. The learned judge asked the jury whether Heslop believed that there was reasonable ground for indicting, and whether he had indicted from malice. The jury answered that Heslop did not so believe; and, as to the malice, they said that they thought that the word "malice" was strong, but that they thought the defendant had indicted from an improper motive. The learned judge then decided that the indictment was without reasonable or probable cause, and told the jury that they might infer malice from the improper motive. Verdict for the plaintiff.

In Michaelmas term (November 5th), 1847,

*Bliss* moved for a new trial, on the grounds of misdirection.<sup>1</sup>

First: the question of the defendant's belief ought not to have been left to the jury. It is for the judge to decide whether there was reasonable and probable cause. It is true that he may, in order to decide this, obtain the opinion of the jury upon facts which, when found, he himself is to act upon in deciding as to the reasonableness and probability. But belief is not such a fact: it is material as to the malice, but there may well exist reasonable and probable cause constituted by facts from which the defendant has wrongly drawn an inference of want of cause. It is otherwise where the belief becomes material as an ingredient in the question of *mala fides*: that was the case in *Ravenga v. Mackintosh*, where the defendant rested his defence upon the ground that he had acted *bona fide* on a legal opinion, and the jury found that he had not so acted. Nothing should be left to the jury but "the truth of the facts proved, and the justice of the inferences to be drawn from such facts;" and it is only as affecting those questions that the belief of the party is material.

Next: the jury were misdirected as to malice. The mere fact that the defendant had an indirect motive, however improper, in instituting the prosecution does not show malice. The malice required in this action is express malice in fact, not mere malice in law. In the judgment of Lords Mansfield and Loughborough, in *Johnstone v. Sutton*,<sup>2</sup> it is said:<sup>3</sup> "From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied." The jury ought therefore to have been told that the indirect motive was quite consistent with absence of malice, unless the defendant knew (not simply believed) that there was no probable cause, or unless there were some evidence of express malice towards the plaintiff.

<sup>1</sup> The statement of facts and the argument for the defendant are abridged; the concurring opinions of COLERIDGE, WIGHTMAN, and ERLE, JJ., are omitted. — ED.

<sup>2</sup> In Exch. Ch. 1 T. R. 510, reversing the judgment of the Court of Exchequer in *Sutton v. Johnstone*, 1 T. R. 493. Judgment of Exch. Ch. affirmed on error, in Dom. Proc., 1 T. R. 784. s. c. 1 Bro. P. C. 76. (2d ed.).

<sup>3</sup> 1 T. R. 545.

LORD DENMAN, C. J. It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause. Reference has been made to *Turner v. Ambler*,<sup>1</sup> where there was an allusion to a decision of my Brother Maule, upheld afterwards in the Common Pleas,<sup>2</sup> to the effect that reasonable and probable cause cannot exist without belief. There may possibly be some difficulty in distinguishing the case last mentioned from some others: but I think that belief is essential to the existence of reasonable and probable cause: I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense.<sup>3</sup> Proof of the absence of belief is almost always involved in the proof of malice. In *Turner v. Ambler*<sup>1</sup> there was no point directly made at the trial as to want of belief: the only question was whether the facts of themselves bore out the probability and reasonableness. But, where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury. It is not absolutely necessary that this belief should be the motive on which he acted: he may act from malice, and yet, if there was reasonable and probable cause in which he believed, the case against him must fail.

*Rule refused as to misdirection.*

<sup>1</sup> 10 Q. B. 252.

<sup>2</sup> The case alluded to is perhaps *Broad v. Ham*, 5 New Ca. 722. By the report of s. c. in 8 Scott, 40, the cause appears to have been tried before Maule, B.

<sup>3</sup> *Broad v. Ham*, 5 B. N. C. 722; *Turner v. Ambler*, 10 Q. B. 252; *Roret v. Lewis*, 5 D. & L. 371; *Hinton v. Heather*, 14 M. & W. 131; *Williams v. Bankes*, 1 F. & F. 557; *Chatfield v. Comerford*, 4 F. & F. 1008; *Shrosbery v. Osmaston*, 37 L. T. Rep. 792; *Steed v. Knowles*, 79 Ala. 446; *Harkrader v. Moore*, 44 Cal. 144; *Bell v. Rawles*, 93 Cal. 222; *Galloway v. Stewart*, 49 Ind. 156; *Donnelly v. Burkett*, 75 Iowa, 613; *Harphan v. Parker*, 52 Me. 502, 505; *Mitchell v. Wall*, 111 Mass. 492; *Bartlett v. Hawley*, 38 Minn. 308; *Pick v. Chouteau*, 91 Mo. 138; *Chicago Co. v. Kriski* (Neb. 1891), 46 N. W. R. 520; *Howard v. Thompson*, 21 Wend. 319; *Burlingame v. Burlingame*, 8 Cow. 141; *Fagnan v. Knox*, 66 N. Y. 525; *Anderson v. How*, 116 N. Y. 336; *Wess v. Stevens*, 128 N. Y. 123; *Wilson v. King*, 39 N. Y. Sup'r Ct. 384; *King v. Colvin*, 11 R. I. 582; *Scott v. Shelor*, 28 Grat. 891; *Forbes v. Hagman*, 75 Va. 168; *Spear v. Hiles*, 67 Wis. 350 *Accord.* — ED.



SECTION I. (*continued*.)

(c) MALICE.

## MITCHELL v. JENKINS, CLERK.

IN THE KING'S BENCH, NOVEMBER 11, 1833.

[*Reported 5 Barnewall & Adolphus, 588.*]

THIS was an action on the case for a malicious arrest.

At the trial, before Taunton, J., at the last Summer Assizes for the county of Devon, it appeared, that the plaintiff was indebted to the defendant in the sum of £45, for one year's composition of tithe; and that the sum of £16 5s. was due to the plaintiff from the defendant; that the defendant, under the advice of his attorney, arrested the plaintiff for the whole sum of £45, instead of for the balance, after deducting the sum of £16 5s. The defendant, on finding out that he was mistaken in point of law, and that he should only have arrested for the balance, discontinued the action.

There was no evidence at all of malice in fact; but the learned judge told the jury, that, as the plaintiff ought not, by law, to have been arrested for more than the balance, the law implied malice; and that the only question for their consideration was, the amount of damages; upon which a verdict was found for the plaintiff for £20.

A rule had been obtained, in a former term, calling on the plaintiff to show cause why that verdict should not be set aside, and a new trial had;<sup>1</sup> against which —

*Follett* now showed cause.

*Coleridge*, Serjt., and *Bere*, contra.

DENMAN, C. J. Every arrest by a creditor for more than is due, is, in some sense, a wrongful act. By statute, if it be made without reasonable or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs, and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent fact; though it may in some instances be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable

<sup>1</sup> The statement of facts is taken from 3 L. J. K. B. N. S. 35. The arguments of counsel and the concurring opinions of PATTESON and TAUNTON, JJ., are omitted. — ED.

or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury.<sup>1</sup> Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE, J. I am also of opinion that there ought to be a new trial, on the ground that the learned judge withdrew altogether from the consideration of the jury the question of malice. I have always understood, since the case of *Johnstone v. Sutton*,<sup>2</sup> which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives.<sup>3</sup> That would not be the case where, there being an

<sup>1</sup> *Willans v. Taylor*, 6 Bing. 183; *Busst v. Gibbons*, 30 L. J. Ex. 75; *Stewart v. Sonneborn*, 98 U. S. 187; *Sanders v. Palmer*, 55 F. R. 218; *Bell v. Rawles*, 93 Cal. 222; *Boyd v. Mendenhall*, 112 Ill. 656; *Medcalfe v. Brooklyn Co.*, 45 Md. 198; *Thelin v. Dorsey*, 59 Md. 539; *Good v. French*, 115 Mass. 201; *Bartlett v. Hawley*, 38 Minn. 308; *McNulty v. Walker*, 64 Miss. 198; *Heyne v. Blair*, 62 N. Y. 19; *Fagnan v. Knox*, 66 N. Y. 525; *Anderson v. How*, 116 N. Y. 336; *Viele v. Gray*, 10 Abb. Pr. 10; *Leahey v. March* (Pa. 1893), 26 Atl. R. 701; *Landa v. Obart*, 45 Tex. 539 *Accord.* — Ed.

<sup>2</sup> 1 T. R. 510.

<sup>3</sup> *Abrath v. North Eastern Co.*, 11 Q. B. Div. 440, 448, 455; *Wiggin v. Coffin*, 3 Story, 1; *Johnson v. Ebberts*, 11 Fed. Rep. 129, 6 Sawy. 538 s. c.; *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Coleman v. Allen*, 79 Ga. 637; *South Western Co. v. Mitchell*, 80 Ga. 438; *Pullen v. Glidden*, 66 Me. 202; *Wills v. Noyes*, 12 Pick. 324; *Mitchell v. Wall*, 111 Mass. 492; *Ross v. Langworthy*, 13 Neb. 492; *Gee v. Culvers*, 13 Oreg. 598; *Culbertson v. Cabeen*, 29 Tex. 247, 256; *Barron v. Mason*, 31 Vt. 189, 198; *Forbes v. Hagman*, 75 Va. 168; *Spear v. Hiles*, 67 Wis. 350 *Accord.*

In *Abrath v. North Eastern Co.*, *supra*, malice was defined by Brett, M. R., p. 448, as "a malicious intention in the mind of the defendant, that is, not with the mere intention of carrying the law into effect," and by Bowen, L. J., as "a malicious spirit, that is, an indirect and improper motive, and not in furtherance of justice." See also especially *Pullen v. Glidden*, and *Johnson v. Ebberts*, cited *supra* in this note. — Ed.

unsettled account, with items on both sides, one of the parties, believing *bona fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bona fide* under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute. *Rule absolute.*<sup>1</sup>

### VANDERBILT v. MATHIS.

IN THE SUPREME COURT, CITY OF NEW YORK, FEBRUARY, 1856.

[Reported in 5 Duer, 304.]

*By the Court*, BOSWORTH, J.<sup>2</sup>—To maintain an action for malicious prosecution, three facts, if controverted, must be established:

1. That the prosecution is at an end, and was determined in favor of the plaintiff.
2. The want of probable cause.
3. Malice.

In such an action, it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that,

<sup>1</sup> Farmer v. Darling, 4 Burr. 1971; Busst v. Gibbons, 30 L. J. Ex. 75; Coulter v. Dublin Co., 60 L. T. 180; Hicks v. Faulkner, 46 L. T. Rep. 127 (affirming s. c. 8 Q. B. D. 167); Wheeler v. Nesbitt, 24 How. 544; Stewart v. Sonneborn, 98 U. S. 191; Wiggin v. Coffin, 3 Story, 1; Burnap v. Albert, Taney, 244; Benson v. McCoy, 36 Ala. 710; Lunsford v. Dietrich, 93 Ala. 565; Bozeman v. Shaw, 37 Ark. 160; Levy v. Brannan, 39 Cal. 485; Harkrader v. Moore, 44 Cal. 144; Porter v. White, 5 Mackey, 180; Harpham v. Whitney, 77 Ill. 32; King v. Ward, 77 Ill. 603; Boyd v. Mendenhall, 112 Ill. 656; Frankfurter v. Bryan, 12 Ill. Ap. 549; Gardiner v. May, 24 Ill. Ap. 286; Newell v. Downs, 8 Blackf. 523; Oliver v. Pate, 43 Ind. 132; Ritchey v. Davis, 11 Iowa, 124; Atchison Co. v. Watson, 37 Kans. 773; Gourges v. Howard, 27 La. An. 338; Humphries v. Parker, 52 Me. 502; Medcalfe v. Brooklyn Co., 45 Md. 198; Mitchell v. Wall, 111 Mass. 492; Bartlett v. Hawley, 38 Minn. 308; Greenwade v. Mills, 31 Miss. 464; Sharpe v. Johnston, 59 Mo. 557; Finley v. St. Louis Co., 99 Mo. 559; McKown v. Hunter, 30 N. Y. 625; Farnam v. Feeley, 56 N. Y. 451; Heyne v. Blair, 62 N. Y. 19; Thompson v. Lumley, 50 How. Pr. 105; Voorhees v. Leonard, 1 Th. & C. 148; Johnson v. Chambers, 10 Ired. 287; Gee v. Culver, 12 Ore. 228, 13 Ore. 598; Schofield v. Fellers, 47 Pa. 194; Dietz v. Langfitt, 63 Pa. 234; Gilliford v. Windel, 108 Pa. 142; Bell v. Graham, 1 N. & M'C. 278; Campbell v. O'Bryan, 9 Rich. 204; Willis v. Knox, 5 S. Ca. 474; Caldwell v. Burnett, 22 S. C. N. S. 1; Evans v. Thompson, 12 Heisk. 34; Stansell v. Young, 64 Tex. 660; Shannon v. Jones, 76 Tex. 141; Barron v. Mason, 31 Vt. 189; Carleton v. Taylor, 50 Vt. 220; Scott v. Shelor, 28 Grat. 891; Forbes v. Hagman, 75 Va. 168.

But see, *contra*, Wilson v. Bower, 64 Mich. 133. — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

alone, is not *prima facie* evidence of the want of probable cause. *Gorton v. De Angelis*.<sup>1</sup>

It is equally essential, that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action, for a former prosecution, it must be shown to have been without probable cause, and malicious. *Vanduzer v. Linderman*,<sup>2</sup> *Murray v. Long*,<sup>3</sup> *Willans v. Taylor*.<sup>4</sup>

The judge, at the trial, charged, that the fact, that the plaintiff was discharged before the magistrate showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show, affirmatively, that there was probable cause.

He was requested to charge, "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged, "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice, in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

He was requested to charge, "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the judge declined to do, and to his refusal to so charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference

<sup>1</sup> 6 Wend. 418.

<sup>2</sup> 10 J. R. 110.

<sup>3</sup> 1 Wend. 140; 2d Stark. Ev. 494.

<sup>4</sup> 6 Bing. 183.

from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkley v. Smith*,<sup>1</sup> the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. / Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

Story, J., in *Wiggin v. Coffin*, instructed the jury that two things must concur, to entitle a plaintiff to recover in such an action: "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In *Vanduzer v. Linderman*,<sup>2</sup> the court said: "No action lies, merely for bringing a suit against a person, without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause, and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that, in making the complaint, the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one, of which the language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact, is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives,

<sup>1</sup> 2 Duer, 271.

<sup>2</sup> 10 J. R. 110.

and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made, to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.

SECTION I. (*continued*).

## (d) DAMAGE.

## BYNE v. MOORE.

IN THE COMMON PLEAS, NOVEMBER 13, 1813.

[*Reported in 5 Taunton, 187.*<sup>1</sup>]

THIS was an action for a malicious prosecution in indicting the plaintiff for an assault and battery. The only evidence on the part of the plaintiff being, that the bill was preferred and not found, Lord Chief Baron Macdonald, who tried the cause, nonsuited him.<sup>2</sup>

*Best*, Serjt., had obtained a rule *nisi* to set aside that nonsuit and have a new trial; against which

*Shepherd*, Serjt., showed cause.

MANSFIELD, C. J. I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it: this bill was a piece of mere waste paper. All the cases in Buller's *Nisi Prius*, 13, are directly against this action, for the author speaks of putting the plaintiff to expense, and affecting his good fame, neither of which could be done here. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action. The judge too might certify in this cause against the costs, if the damages had been under 40s.

HEATH, J., concurred.

CHAMBRE, J. It would be a very mischievous precedent if the action could be supported on this evidence.

*Rule discharged.*<sup>3</sup>

<sup>1</sup> 1 Marsh. 12, s. c. — Ed.

<sup>2</sup> The statement of the case has been taken from 1 Marsh. 12; the arguments of counsel are omitted. — Ed.

<sup>3</sup> See *Savile v. Roberts*, 1 Ld. Ray. 374; 12 Mod. 208, s. c.

“It is difficult to see on what grounds it can be maintained that a charge of breaking the peace conveys no imputation on the character of the person charged, and it may be doubted whether the authority of the cases above mentioned (*Byne v. Moore* and *Savile v. Roberts*) would now be recognized on this point.” Clerk & Lindsell, *Torts*, 502. — Ed.

## SECTION II.

*Malicious Institution of Proceedings in Bankruptcy.*

## CHAPMAN v. PICKERSGILL.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1762.

[Reported in 2 Wilson, 145.]

ACTION upon the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, who declared upon three counts; in the first, having stated his honesty, he alleges that the defendant did falsely and maliciously exhibit a petition to the Lord Chancellor that the plaintiff was indebted to him in £200, and had committed an act of bankruptcy, that the commission thereupon issued, and the plaintiff was declared a bankrupt, and that afterwards the commission was superseded; and the plaintiff avers that he never committed any act of bankruptcy; the second count is much the same, with the like averment; the third count is much the same, but without such averment. To this the defendant pleaded the general issue, and there was a general verdict and damages for the plaintiff taken, upon all the three counts; whereupon it was moved that the judgment might be arrested.

This case was argued twice at the bar, in two former terms by Serjeant *Hewitt* and Serjeant *Burland* for the defendant, and by Serjeant *Whitaker* and Serjeant *Nares* for the plaintiff; and in this term the Lord Chief Justice gave the opinion of the whole court, that judgment must be for the plaintiff.

LORD CHIEF JUSTICE. Upon the arguing of this case, the first objection was, that this action will not lie, there being a remedy given by statute, that a proceeding on a commission of bankruptcy, was a proceeding in nature of a civil suit; and that no action of this sort was ever brought: but we are all of opinion that this action is maintainable.<sup>1</sup>

The general grounds of this action are, that the commission was falsely and maliciously sued out, that the plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtain-

<sup>1</sup> *Watson v. Norbury*, Sty. 3, 201; *Brown v. Chapman*, 1 W. Bl. 427; *Cotton v. James*, 1 B. & Ad. 128; *Whitworth v. Hall*, 2 B. & Ad. 698; *Hay v. Weakley*, 5 C. & P. 361; *Farley v. Danks*, 4 E. & B. 499; *Johnson v. Emerson*, L. R. 6 Ex. 329; *Metropolitan Bank v. Pooley*, 10 Ap. Cas. 210; *Stewart v. Sonneborn*, 98 U. S. 187; *Lawton v. Green*, 5 Hun, 157; *Carleton v. Taylor*, 50 Vt. 220 (*semble*) *Accord*.

Similarly an action will lie without proof of special damage for a malicious and unfounded presentation of a petition to wind up a trading company. *Quartz Co. v. Eyre*, 11 Q. B. Div. 674. — Ed.



ing a *supersedeas* to the commission ; here is falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself. See 5 Mod. 407, 8 ; 10 Mod. 218 ; 12 Mod. 210. I take these to be two leading cases, and it is dangerous to alter the law. See also 12 Mod. 273 ; 7 Rep. Bulwer's case, 1. 2 Leon. — 1 Ro. Abr. 101 ; 1 Ven. 86 ; 1 Sid. 464. But it is said this action was never brought ; and so it was said in *Ashby and White* ; I wish never to hear this objection again. This action is for a tort ; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy falsely and maliciously, is of the most injurious consequence in a trading country.

It is further said the stat. 5 Geo. 2, has given a remedy, and therefore this action will not lie ; but we are all of opinion, that in this case the plaintiff would have been entitled to this remedy by action at common law, if this Act had never been made, and that the statute being in the affirmative, hath not taken away the remedy at law. 2 Raym. 163. And this is an universal rule, that an affirmative statute is hardly ever repealed by a subsequent affirmative statute, for if it is possible to reconcile two statutes they shall both stand together ; if they cannot be reconciled, the last shall be a repeal of the first ; but the most decisive answer is, that this statute-remedy is a most inadequate and uncertain remedy ; for though there be the most outrageous malice and perjury, and the party injured suffer to the amount of ten or twenty thousand pounds, yet the Chancellor has no power to give him more than the penalty of £200 ; besides, the method of applying to the Chancellor, is more tedious, expensive, and inconvenient than this common law remedy, and this case in its nature is more properly the province of a jury, than of any judge whatever.

It is further objected, that in the third count there is no averment that the plaintiff was not indebted to the defendant, or ever committed an act of bankruptcy ; but no case was cited to show such averment to be necessary ; the ground and substance of the declaration is falsehood and malice ; there are no instances of such averments in conspiracy, that the party was innocent, or did not do the fact on which he was indicted, but the precedents are the other way. In an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver he is not a thief, and this case is analogous ; for after the plaintiff has alleged that the commission was false and malicious, it would be tautology, to make such averment that he was not indebted, &c., and this declaration would have been good on a demurrer ; more clearly it is so, after a verdict.

*Judgment for the plaintiff.*

## SECTION III.

*Malicious Inquisition of Lunacy.*

## LOCKENOUR v. SIDES AND ANOTHER.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1877.

[Reported in 57 Indiana Reports, 360.]

FROM the Washington Circuit Court.

*H. Heffren and S. B. Voyles*, for appellants.*T. L. Collins and A. B. Collins*, for appellees.

WORDEN, J.<sup>1</sup> This was an action by the appellant against the appellees, to recover damages for an alleged malicious prosecution.

Demurrer, for want of sufficient facts, sustained, and exception. Final judgment for defendants.

Errors assigned upon the rulings in sustaining the demurrer.

The complaint alleged, in substance, that the defendants, conspiring and confederating together, maliciously and without probable cause, instituted and carried on proceedings against the plaintiff, in that court, at the March term thereof, 1874, to procure him to be adjudged insane, and to thereby deprive him of the right and liberty to manage and control his property, and to place him under guardianship; that the defendant Shoemaker filed the complaint or statement in writing, alleging the plaintiff's unsoundness of mind, and that a summons issued thereupon and was served upon the plaintiff herein, requiring him to appear in that behalf; that he did appear, and was put to great trouble and expense in employing counsel and attorneys in that behalf, to wit, an expense of three hundred dollars; that by reason of the false charges thus made by the conspirators, the plaintiff was compelled to exert himself beyond his physical powers, he being an old man and in feeble health, to meet and resist the false charges thus made, whereby he became prostrated and broken down in health, to such an extent that he was compelled to employ physicians to attend upon, prescribe for, and nurse him for the period of four months, at an expense of two hundred dollars; during all which time his business suffered great loss and waste.

The prosecution resulted in the discharge of the plaintiff herein from the proceeding.

The second paragraph was much the same as the first in its general features, but alleged that the defendants hired James Mahan to file the complaint.

Both paragraphs set out the matter complained of very fully and in detail, but we have thought it unnecessary to transcribe them here in

<sup>1</sup> The opinion has been slightly abridged. — ED.

full. We have only stated enough to show the general nature of the action. The averments are full in each paragraph, and each states facts sufficient, in our opinion, to constitute a cause of action, if an action will lie for prosecuting such a proceeding maliciously and without probable cause.

The statute provides for the trial of the question of unsoundness of mind, {“ whenever any person shall by statement in writing, represent to the court having probate jurisdiction, in any county, that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate.” If found to be of unsound mind, a guardian is to be appointed for him, who is to have custody of his person and the management of his estate. If the person is found not to be of unsound mind, the court shall give judgment for costs against the person making the complaint. See 2 R. S. 1876, p. 598.

The appellees claim, as we understand their brief, that the plaintiff cannot recover, inasmuch as the proceedings to test his sanity were not criminal proceedings, and he was not arrested or in any manner deprived of his personal liberty, nor was his property interfered with; and as to the expense to which he was put, he was fully indemnified by his judgment for costs against the parties filing the complaints.

We are aware that it has been sometimes thought that an action will not lie for maliciously, and without probable cause, prosecuting a mere civil action. Thus it is said in 2 Addison Torts, p. 752, “ If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action.” The more modern doctrine, however, and especially the American doctrine, seems to be otherwise. 1 Hilliard Torts, 4th ed., p. 443, sec. 11.

In England, it is held, that an action will lie for falsely and maliciously suing out a commission of bankruptcy. *Chapman v. Pickersgill*. See, also, *Farlie v. Danks*.<sup>1</sup>

In turning to the American cases, we find that in *Whipple v. Fuller*,<sup>2</sup> it was held, that “ an action on the case at common law, is sustainable for a vexatious civil suit, in which there was no arrest, or holding to bail.”

CHURCH, J., said, in delivering the opinion of the court:—

“ But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute of Marlbridge, which was passed in the 52d year of Hen. III., no costs were recoverable in civil actions. This statute, and others subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff, *pro falso clamore*. Whatever might have been true when the several statutes giving costs were enacted, we cannot, at this day, shut our eyes to the truth known by every-

<sup>1</sup> 30 Eng. Law & Eq. 115.

<sup>2</sup> 11 Conn. 581.

body, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares, that for every injury there is a remedy. Before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. . . . And this principle is, and ought to be, operative still, in all cases where the taxation of costs is not an ample remedy. *Saville v. Roberts*.<sup>1</sup>

"It is upon this principle, in part at least, that actions have ever been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. 1 Salk. 14. 10 Mod. 148. *Smith v. Hixon*.<sup>2</sup>

"So also, if two or more persons conspire to vex and harass any person with groundless and malicious civil suits, they were not only punishable *criminaliter*, but liable to a civil action. *Staundford P. C.* 172. 1 Inst. 562. *Co. Litt.* 161 *a.*"

In the more recent case of *Closson v. Staples*,<sup>3</sup> the same doctrine was held, after full consideration of the question. The court said, in conclusion, upon that branch of the case:—

"We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit, in excess of the taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only."

To the same effect are the cases of *Pangburn v. Bull*;<sup>4</sup> *Cox v. Taylor's Adm'r*.<sup>5</sup> See, also, *Vanduzor v. Linderman*;<sup>6</sup> *White v. Dingley*.<sup>7</sup>

The proceedings to procure the plaintiff to be found insane, and to place him under guardianship, are not entirely like a civil action, in which the plaintiff therein claims some right in his own behalf. If the proceedings were instituted and carried on by the defendants maliciously and without probable cause, as alleged, the defendants were officious intermeddlers, without any claim of right or interest in the matter; and they are, in our opinion, liable to the plaintiff for the damages, in excess of the taxable costs, sustained by him by means of the proceedings.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

<sup>1</sup> 12 Mod. 208; s. c. 1 Salk. 14.

<sup>2</sup> 42 Vt. 209.

<sup>3</sup> 10 B. Monroe, 17.

<sup>7</sup> 4 Mass. 433.

<sup>2</sup> 2 Stra. 977.

<sup>4</sup> 1 Wend. 345.

<sup>6</sup> 10 Johns. 106.

## SECTION IV.

*Malicious Arrest, Attachment, or Execution.*

## STRIBLER v. JONES AND WATERS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1670.

[Reported in 1 Levinz, 275.]

CASE, and declares, that the defendant falsely and maliciously devising to damnify him, and to hinder him from going about his affairs, sued a *latitat* against him out of the King's Bench in trespass, with *ac etiam assumpsit* for £500 and caused him to be arrested and imprisoned for such a time, whereas in truth he had not any cause of action, *vel saltem non tantam causam actionis*. After verdict for the plaintiff, it was moved in arrest of judgment, that it is not positively said, *that he had not cause of action*; but *none, or at least not so great*; and it is not so great if it fails but of 1s. of so much. But the court to the contrary, it is found to be done maliciously, wherefore judgment was ruled for the plaintiff. But for that the *teste* and return of the *lat'* was not certainly shown, the court would advise upon this execution.<sup>1</sup>

## TOMLINSON AND SPERRY v. HENRY WARNER.

IN THE SUPREME COURT, OHIO, DECEMBER, 1839.

[Reported in 9 Ohio Reports, 104.]

MALICIOUS prosecution. From Licking. The plaintiffs declared that they were residents of the town of Newark, and possessed of a large amount of personal property, deposited in a warehouse to be forwarded to New York, for a market; and that the defendant well knowing the premises, and that the plaintiffs had not absconded, but contriving and maliciously intending wrongfully to injure them, made

<sup>1</sup> *Malicious Arrest*. — Daw v. Swain, 1 Sid. 424; Parker v. Langley, Gilb. 163; 10 Mod. 210, s. c.; Goslin v. Wilcock, 2 Wils. 302; Sinclair v. Eldred, 4 Taunt. 7; Pierce v. Street, 3 B. & Ad. 397; Crozer v. Pilling, 4 B. & C. 26; Saxon v. Castle, 6 A. & E. 652; Roret v. Lewis, 5 D. & L. 371; Medina v. Grove, 10 Q. B. 152; Daniels v. Fielding, 16 M. & W. 200 (*semble*, see Clerk v. Lindsell, Torts, 520); Moore v. Gardner, 16 M. & W. 595 (*semble*); Ross v. Norman, 5 Ex. 359; Ventress v. Rosser, 73 Ga. 534; Joiner v. Ocean Co., 86 Ga. 238; Cardinal v. Smith, 109 Mass. 158; Hamilburgh v. Shepard, 119 Mass. 30; Stanfield v. Phillips, 78 Pa. 73; Emerson v. Cochran, 111 Pa. 619; Ward v. Suter, 70 Tex. 343.

*Malicious Holding to Bail*. — Steer v. Scoble, Cro. Jac. 667; Berry v. Adamson, 6 B. & C. 528; Small v. Gray, 2 C. & P. 605 *Accord*. — Ed.

oath before a justice of the peace, that they had absconded to the injury of their creditors, as he verily believed, and thereupon sued out of the Court of Common Pleas, a writ of attachment, and caused the said property to be seized by the sheriff, and held for a long time, whereby the same was injured, the plaintiffs deprived of the opportunity of forwarding their goods to a market, and greatly injured. Plea, not guilty.

Upon trial to the jury, the counsel for the plaintiffs *admitted* that the plaintiffs were indebted to the defendant at the time of his affidavit, as sworn to in it; whereupon the court directed a nonsuit, with leave to move to open it, and for a new trial, which is now made.

*Geo. B. Smythe, and H. H. Hunter, for plaintiffs.*

*T. Ewing, H. Stanberry, and J. R. Stanberry, for the defendant.<sup>1</sup>*

*By the Court, Wood, J.* The only question presented in this motion is, do the facts set forth in the declaration constitute a legal cause of action, provided the plaintiffs were indebted to the defendant, when he sued out the writ of attachment?

In Connecticut, there is a statute which provides, that where a plaintiff shall "willingly and wittingly" wrong any defendant by prosecuting any action against him with intent wrongfully to trouble and vex him, such plaintiff shall pay treble damages for the first offence, be liable to a fine for the second, and for the third, may be proceeded against as a common *barrator*. Judge Swift thinks the act founded in the clearest principles of justice.<sup>2</sup> At common law, it seems well settled, that no action will lie for a *malicious* prosecution of a *civil* suit, *without* cause, where there is no arrest.<sup>3</sup> The costs allowed in all other cases are supposed to be a sufficient compensation for the injury, however malicious. The rule itself may perhaps be admitted, but *the reason* on which it is said to be founded cannot be so readily admitted, for at common law *no costs were allowed*. If the plaintiff failed, he was amerced for his *false clamor*, and if he succeeded, the defendant was at the mercy of the King. But at common law, whenever there was an arrest, holding to bail, or imprisonment, where *no debt was due, or for a greater sum than was due*, with a malicious intention to injure, the action lay for a *malicious arrest*.<sup>4</sup> The action for a *malicious prosecution*, which technically only applies to cases of malicious prosecution of criminal complaints, lies as well where there is *not*, as where there is *an arrest*; and the grounds of the action are the *malice* of the defendant, want of *probable cause*, and injury to the plaintiff's person by imprisonment, his reputation by scandal, or to his property by expense.<sup>5</sup> Having no *direct* adjudication on the question before us, we may look to the analogies of the law. The counsel for the defendant insist that because the plaintiffs' indebtedness to the defendant in the former suit is admitted, there *was*

<sup>1</sup> The arguments of counsel are omitted. — Ed.

<sup>2</sup> Swift Dig. 493.

<sup>3</sup> 1 Salk. R. 14.

<sup>4</sup> 1 Saund. R. 228.

<sup>5</sup> 1 Swift Dig. 491.

*probable cause* for suing out the writ of attachment. This does not seem to us to follow. To constitute probable cause for suing out a writ of attachment, the law requires an affidavit of indebtedness, and *also that the debtor has absconded, or is non-resident*. The absence of either is absence of *probable cause* for the writ, and the false affirmation of either fact, *knowingly*, as a means of procuring the writ, shows express malice, whilst the taking of property without cause is a sufficient injury to sustain the action.

In the Supreme Court of New York, it has been decided, that case would lie against both plaintiff and defendant, for fraudulently setting up the judgment *as unsatisfied*, when in fact paid, and causing an execution and sale of land once held by it as a lien, but which had been afterwards conveyed by the defendant to a third person. The court in that case say, "If it appear that the unlawful acts of the defendant occasioned trouble, inconvenience, or expense to the plaintiff, this action lies." The general rule is, that for *every* injury the law gives redress; and it would be a reproach to the administration of justice, if one, by perjury, could take from another the control of his property, under *form of law*, and the law afford no remedy. Nice technicalities are sometimes applied to get rid of a *hard case*; but when, under *form of law*, opportunity is sought to gratify malice, to the injury of another, courts will not be astute to *avoid*, but rather seek ground to *sustain* an action. We have no *facts* in this case, before us, but the statement in the declaration, and the *admission* of indebtedness; but these show a sufficient *prima facie* cause of action, and cause for opening up the nonsuit. *New trial granted.*<sup>1</sup>

<sup>1</sup> *Malicious Seizure of Property on Civil Process*. — Sanders v. Powell, 1 Lev. 129, 1 Sid. 183, 1 Keb. 603, s. c.; Craig v. Hasell, 4 Q. B. 481; Medina v. Grove, 10 Q. B. 152; Redway v. McAndrew, L. R. 9 Q. B. 74; Kirksey v. Jones, 7 Ala. 622; Juchter v. Boehmer, 67 Ga. 534; Wilcox v. McKenzie, 75 Ga. 73; Lawrence v. Hagerman, 56 Ill. 68; Spaid v. Barrett, 57 Ill. 289; Western Co. v. Wilmarth, 33 Kans. 510; Willis v. Noyes, 12 Pick. 324; Savage v. Brewer, 16 Pick. 453; O'Brien v. Barry, 106 Mass. 300; Bobsin v. Kingsbury, 138 Mass. 538; Grant v. Reinhart, 33 Mo. Ap. 74; Smith v. Smith, 56 How. Pr. 316; Fortman v. Rottier, 8 Ohio St. 548; Summer v. Wilt, 4 S. & R. 19; Mayer v. Walter, 64 Pa. 283 *Accord*.

*Malicious Issue of an Injunction*. — Munce v. Black, 7 Ir. C. L. R. 475; Manlove v. Vick, 55 Miss. 567; Coal Co. v. Upson, 40 Ohio St. 17 *Accord*.

*Malicious Procurement of the Execution of a Search Warrant*. — Cooper v. Booth, 3 Esp. 144, s. c. 1 T. R. 535 (*cited*); Elsee v. Smith, 2 Chit. R. 304, 1 D. & R. 97, s. c.; Wyatt v. White, 29 L. J. Ex. 193; Carey v. Sheets, 60 Ind. 17, 67 Ind. 375; Whitson v. May, 71 Ind. 269; Olson v. Tvete, 46 Minn. 225; Miller v. Brown, 3 Mo. 127, 131; Boeger v. Langenberg, 97 Mo. 390 *Accord*.

See also Hope v. Evered, 17 Q. B. D. 338; Lea v. Charrington, 23 Q. B. Div. 45; Utting v. Berney, 5 Times L. R. 39. — Ed.

## JENINGS v. FLORENCE.

IN THE COMMON PLEAS, JUNE 12, 1857.

[Reported in 2 Common Bench Reports, New Series, 467.]

COCKBURN, C. J., delivered the judgment of the court :<sup>1</sup>—

This was an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a writ of execution issued upon a judgment obtained by the defendant against the plaintiff, and upon which the defendant, as the declaration alleges, maliciously and without reasonable or probable cause indorsed a direction to levy the whole amount recovered by the judgment, whereas, a portion of that amount had been previously satisfied : and the declaration proceeds to allege, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, and discharged the judgment by paying, the smaller sum ; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid. To this declaration the defendant demurred ; and the case was argued on his behalf by *Mr. Manisty*, who admitted the authority of the case of *Churchill v. Siggers*,<sup>2</sup> where the Court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause for more than remained due upon the judgment, as in the present case, special damage being shown to have been sustained by the plaintiff in consequence of such arrest. He, however, insisted that such damage was not sufficiently shown by the declaration in the present case.

We are, however, of opinion that special damage is sufficiently alleged. It would not be competent for the plaintiff at the trial to obtain a verdict by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly indorsed ; but he must also prove, that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

Judgment must, therefore, be for the plaintiff.

*Judgment for the plaintiff.*<sup>3</sup>

<sup>1</sup> Only the opinion of the court is given. — Ed.

<sup>2</sup> 3 Ellis & B. 929.

<sup>3</sup> *Churchill v. Siggers*, 3 E. & B. 929 ; *Gilding v. Eyre*, 10 C. B. N. S. 592 ; *Sumner v. Wilt*, 4 S. & R. 19 ; *Davis v. Clough*, 8 N. H. 157 *Accord*.

See *Huffer v. Allen*, L. R. 2 Ex. 15.

But a malicious seizure under a distress of a proper amount of goods, although under a claim of more than is due, is justifiable. *Stevenson v. Newnham*, 13 C. B. 285. — Ed.



## SECTION V.

*Malicious Institution of a Civil Action without Arrest or Attachment.*

WETMORE v. MELLINGER AND ANOTHER.

IN THE SUPREME COURT, IOWA, APRIL 9, 1884.

[Reported in 64 Iowa Reports, 741.]

BECK, J.<sup>1</sup> The petition alleges that defendants brought an action against plaintiff and his wife, charging in the petition that they two conspired and confederated together to defraud defendants, by representing to defendants, under the assumed name of Baker, that they were the owners of certain lands in Poweshiek County, which defendants were induced to purchase of plaintiff and his wife, who, in such assumed name, executed to defendants a warranty deed therefor; that, in an action by one Woodward, a deed, purporting to be executed by him to the Bakers, under which they claimed title to the lands, was declared to be void, for the reason that it was forged and fraudulent, and that plaintiff herein and his wife well knew the condition of their title, and representing that they were the owners thereof, for the purpose of cheating defendants, and of obtaining money by false and fraudulent pretences, and did, in that manner, obtain the sum of \$3,000 from defendants. It is further alleged that defendants herein served out a writ of attachment in the suit brought by them, which was levied upon real estate owned by plaintiff's wife, and that defendants for a time prosecuted their action, but finally dismissed it at their own costs. Plaintiff, in his petition in this case, alleges that he was not indebted to defendants in any sum at the time their action was brought against him; that he was not guilty of the frauds therein charged, and that the action was commenced and prosecuted by defendants maliciously and without probable cause. The defendants, in their answer, admit the commencement of the suit, the issuing of the attachment, and that it was levied upon real estate owned by plaintiff's wife. There was no evidence showing, or tending to show, that the writ of attachment was levied upon any property owned by plaintiff. The wife of plaintiff does not join in this action.

We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action.

<sup>1</sup> Only the opinion of the court on this point is given. — ED.

See 1 Am. Leading Cases, p. 218, note to *Munn v. Dupont et al.*, and cases there cited; *Mayer v. Walter*; <sup>1</sup> *Kramer v. Stock*; <sup>2</sup> *Bitz v. Meyer*; <sup>3</sup> *Eberly v. Rupp*; <sup>4</sup> *Gorton v. Brown*; <sup>5</sup> *Woodmansie v. Logan*; <sup>6</sup> *Parker's Adm'rs v. Frambes*; <sup>7</sup> *Potts v. Imlay*.<sup>8</sup>

This doctrine is supported by the following considerations: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it.

It will be observed that the statement of the doctrine we have made extends it no farther than to cases prosecuted in the usual manner, where defendants suffer no special damages or grievance other than is endured by all defendants in suits brought upon like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious, or prosecuted maliciously and without probable cause. They are incidents of litigation. But if an action is so prosecuted as to entail unusual hardship upon the defendant, and subject him to special loss of property or of reputation, he ought to be compensated. So, if his property be seized, or if he be subjected to arrest by an action maliciously prosecuted, the law secures to him a remedy. In the case at bar, the pleadings and evidence show no such special damages. No action could be prosecuted to recover money fraudulently obtained, in which the defendant would not suffer the very things for which plaintiff in this case seeks compensation in damages.

Counsel for plaintiff, in support of their position that the action may be maintained, though no arrest of defendant or seizure of property be had in the proceeding alleged to have been maliciously prosecuted, cite *Green v. Cochran*,<sup>9</sup> and *Moffatt et al. v. Fisher*.<sup>10</sup> In the first case, the action alleged to be malicious was a proceeding for bastardy, which, under the statute, operated as a lien upon defendant's lands from the commencement. In the other case, the action which was the foundation of plaintiff's claim was forcible entry and detainer, and, before

<sup>1</sup> 64 Pa. St. 289.

<sup>3</sup> 11 Vroom, 252, s. c. 29 Am. Rep. 233.

<sup>5</sup> 27 Ill. 489.

<sup>7</sup> Id. 156.

<sup>9</sup> 43 Iowa, 544.

<sup>2</sup> 10 Watts, 115.

<sup>4</sup> 90 Pa. St. 259.

<sup>6</sup> 2 N. J. L. 93 (1 Pen.).

<sup>8</sup> 4 N. J. L. 330 (1 South.).

<sup>10</sup> 47 Id. 473.

final disposition thereof, the defendant was ousted of possession of the land, whereon was a coal mine. In both instances the property of the respective defendants was reached by the proceedings. The facts of these cases are not within the rule we have stated, and do not support counsel's position.

*Affirmed.*<sup>1</sup>

<sup>1</sup> *Savile v. Roberts*, 1 Ld. Ray. 378; *Purton v. Honnor*, 1 B. & P. 205; *Cotterell v. Jones*, 11 C. B. 713; *Quartz Co. v. Eyre*, 11 Q. B. Div. 674; *Ray v. Law*, Pet. C. C. 207; *Mitchell v. South Western Co.*, 75 Ga. 398; *Smith v. Hintrager*, 67 Iowa, 109; *Cade v. Yocum*, 8 La. An. 477; *McNamee v. Minks*, 49 Md. 122 (see *Clements v. Odorless Co.*, 67 Md. 461); *Woodmansie v. Logan*, 1 Penningt. 93; *Potts v. Imlay*, 1 South. 330; *State v. Meyer*, 40 N. J. 252; *Kramer v. Stock*, 10 Watts, 115; *Mayer v. Walter*, 64 Pa. 283; *Muldoon v. Rickey*, 103 Pa. 110; *Emerson v. Cochran*, 111 Pa. 619, 622; *Smith v. Adams*, 27 Tex. 30; *Johnson v. King*, 64 Tex. 226 *Accord*.

*Eastin v. Stockton Bank*, 66 Cal. 123; *Berson v. Ewing*, 84 Cal. 89; *Hoyt v. Macon*, 2 Colo. 113 (*semble*); *Whipple v. Fuller*, 11 Conn. 582; *Wall v. Toomey*, 52 Conn. 35; *Payne v. Donegan*, 9 Ill. Ap. 566 (*semble*); *Lockenour v. Sides*, *supra*, 565; *McCardle v. McGinley*, 86 Ind. 538; *Marbourg v. Smith*, 11 Kans. 554; *Cox v. Taylor*, 10 B. Mon. 17; *Woods v. Finnell*, 13 Bush, 628; *Allen v. Codman*, 139 Mass. 136 (*semble*); *McPherson v. Runyon*, 41 Minn. 524; *O'Neill v. Johnson* (Minn. 1893), 55 N. W. R. 601; *Brown v. City*, 90 Mo. 377 (*semble*); *Pangburn v. Bull*, 1 Wend. 345; *Dempsey v. Mitchell*, 52 How. Pr. 11; *Smith v. Smith*, 56 How. Pr. 316 (*semble*); *Willard v. Holmes*, 21 N. Y. Sup. 998 (*semble*); *Pope v. Pollock*, 46 Oh. St. 367; *Closson v. Staples*, 42 Vt. 209 *Contra*.

In *Eastin v. Stockton Bank*, *supra*, the court said: "The English cases which deny the right to maintain the action, stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs recoverable under the statute are confined to much narrower limits. . . .

"Two other objections made to the maintenance of the action, — first, the claim that if such suits are allowed, litigation will become interminable, because every successful action will be followed by another, alleging malice in the prosecution of the former; and second, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defence, — are well answered in the article already alluded to [Mr. Lawson's note, 21 A. L. Reg. N. S. 281, 353]: 'To the first objection, it is enough to say that the action will never lie for an unsuccessful prosecution, unless begun and carried on with malice and without probable cause. With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously he is the cause of the defendant's damage. But the defendant stands only on his legal rights — the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.'"

## JOHN O'BRIEN AND WIFE v. MICHAEL M. BARRY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1871.

[Reported in 106 *Massachusetts Reports*, 300.]

MORTON, J.<sup>1</sup> At the trial, the plaintiffs offered to prove, in substance, the following facts: That the defendant maliciously and without probable cause, having no title to the goods replevied, sued out a writ of replevin against the male plaintiff, and caused the officer to replevy and remove the furniture of the plaintiffs; that he did this for the purpose of injuring the female plaintiff; and that she was thereby greatly injured.<sup>2</sup> It was admitted that the replevin suit was pending at the time this action was commenced. The question is, whether upon these facts, if proved, this action can be maintained.

It is an action of a novel character, but some of the rules which govern actions for malicious prosecutions apply to it and are decisive of the question raised. If an action of this nature can be maintained at all, it is obvious that it can only be upon proof that the plaintiff in the former action, which is alleged to be malicious, had not a legal cause of action. If he had, it would be his right to enforce it by the remedies provided by law, and he would not be liable for any injuries which might incidentally result, although he acted with malice. In so doing, he commits no unlawful act for which an action will lie against him. *Lindsay v. Larned*; <sup>3</sup> *Randall v. Hazelton*. The question whether Barry had a legal cause of action was involved in, and we think, as between these parties, could only be tried in, the replevin suit. The male plaintiff, being a party to that suit, would be bound by its result. If Barry had recovered a judgment in that suit, this action could not be maintained, because it would thus be conclusively settled that his act in replevying the goods was lawful. Any irregularity in the service of the writ of replevin must be taken advantage of in that suit, or it must be deemed to have been waived. The fact that this suit is for an injury to the wife does not take the case out of the operation of this rule. It is one of the incidents of the marriage relation, that the husband must join in such suit. It is substantially his suit; he can discharge it, and is entitled to the proceeds if judgment is recovered. *Southworth v. Packard*.<sup>4</sup>

In an action for malicious prosecution, the plaintiff must show that the prosecution or suit complained of has been terminated by a judgment in his favor. In that suit only can the question whether the

<sup>1</sup> Only the opinion of the court is given. — ED.

<sup>2</sup> The plaintiff was prepared to prove that the furniture removed included the only stove of the male plaintiff, that the day chosen for the removal was one of the coldest days in winter, and that the female plaintiff, as the defendant well knew, was at the time quick with child. — ED.

<sup>3</sup> 17 Mass. 190.

<sup>4</sup> 7 Mass. 95.

defendant had a good cause of action against the plaintiff be litigated. The reasons of the rule apply with equal force to an action like the present. It is against the policy of the law, that the same questions should be litigated between the same parties in successive suits. At the time this action was commenced, the replevin suit, which is alleged to be malicious and without probable cause, was pending; and a majority of the court is of opinion that, if the plaintiffs can under any circumstances maintain an action of this nature, this fact is decisive against this action. *Johnson v. Shove*.<sup>1</sup> *Exceptions overruled*.<sup>2</sup>

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PECHELL AND OTHERS v. WATSON AND ROGERS.

IN THE EXCHEQUER, MAY 29, 1841.

[*Reported in 8 Meeson & Welsby, 691.*]

CASE. The first count of the declaration stated, that the defendant heretofore, to wit, on 1st January, 1838, contriving and maliciously intending to injure the plaintiffs, and to put them to great vexation and expense, unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit next hereinafter mentioned, did advise and stir up one Richard Hearsey, then being a pauper, to prosecute an action of trespass against the plaintiffs. And the now plaintiffs further say, that by and through such advice and stirring up, the said Richard Hearsey did in fact, without reasonable or probable cause, commence and prosecute the said action of trespass, and that such proceedings were thereupon had, that afterwards, to wit, on &c. [stating a judgment of nonsuit against the plaintiff Hearsey, and a suggestion for double costs to the defendants, as justices of the peace]. Whereby the now plaintiffs were not only put to great trouble and vexation, but were also obliged to pay a large sum, to wit, £600, in and about the defence of the said action; and the said now plaintiffs, by reason of the poverty of the said Richard Hearsey, have hitherto been unable to obtain satisfaction from him for or in respect of the said costs so adjudged to the said plaintiffs in the said suit, &c.

The second count stated, that, before the time of the committing of the grievances by the defendants as thereinafter next mentioned, a certain other action of trespass had been commenced in the Court of our Lady the Queen, &c., wherein one R. Hearsey was plaintiff, and the now plaintiffs were defendants; that at the time of the committing the said

<sup>1</sup> 6 Gray, 498.

<sup>2</sup> "For maliciously prosecuting a good cause of action in the manner provided by law, for the purpose of recovering damages therein, there is no remedy, because there is no wrong." *Per* Field, J., in *Johnson v. Reed*, 136 Mass. 421, 423. See also *May v. Childress*, 2 Tenn. Ch. 442. — Ed.

grievances, &c., the said last-mentioned action was depending in the said court; yet the now defendants, wrongfully, unjustly, and maliciously contriving and intending to injure the now plaintiffs, and to vex, harass, and impoverish them, and to subject them to great and heavy costs and expenses, wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said last-mentioned action on the part and behalf of the said Richard Hearsey, the plaintiff therein, against the now plaintiffs, so being defendants therein as aforesaid; by reason of the committing of which said last-mentioned grievances, the now plaintiffs have been greatly injured, and have been obliged to pay divers large sums of money, amounting &c., in or about their defence of the said action; and which said moneys have become and are wholly lost to the plaintiffs.<sup>1</sup>

Plea, Not guilty.

A general verdict was given for the plaintiff on the whole declaration.

In Michaelmas term, *Bompas*, Serjt., for the defendant Watson, moved for a rule to show cause why the judgment on the verdict found for the plaintiffs should not be arrested. — The first count of the declaration is bad in substance. A has no right of action against B, because B has sued A without reasonable and probable cause; therefore also A has no right of action against a party who has instigated and stirred up B so to sue A. The maintenance of another, where no suit is actually pending, has been held not to be actionable, although it may be indictable.<sup>2</sup> Neither does the count allege that the defendants knew that Hearsey was a pauper. It is, indeed, alleged that they maliciously instigated him to commence the action; but the word “maliciously” means only from indirect and improper motives, and does not imply personal malice to the plaintiffs. But, inasmuch as the pauper himself would not be liable to an action, so neither can the party who advised or instigated him, unless, indeed, where the circumstances amount to a conspiracy.

The court expressed their opinion that the first count was good, but granted a rule on the other points.<sup>3</sup>

<sup>1</sup> The statement of the counts is abridged. — Ed.

<sup>2</sup> Vin. Abr. Maintenance (T. 3).

<sup>3</sup> The rule was ultimately discharged, so that the second count also was sustained by the court. In accordance with the decision on this count are *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Goodyear Co. v. White*, 2 N. J. L. J. 150. Compare *Metropolitan Co. v. Pooley*, 10 App. Cas. 210, 217–218. — Ed.

## THOMAS FLIGHT v. LEMAN.

IN THE QUEEN'S BENCH, JUNE 9, 1843.

[Reported in 4 Queen's Bench Reports, 883.]

CASE. The second count of the declaration alleged that the defendant heretofore, to wit 1st January, 1838, and on divers &c. between that day and 22d November, 1838, contriving and maliciously intending to injure, harass and damnify plaintiff, and to put him to great vexation, unlawfully and maliciously did advise, procure, instigate and stir up John Thomas to commence and prosecute an action of trespass on the case in the court &c. (Queen's Bench) against the now plaintiff; that by and through such advice, procurement, instigation and stirring-up, John Thomas did in fact afterwards, to wit 4th January, 1838, commence and prosecute the last-mentioned action. The present declaration then set out three counts of a declaration in case at the suit of John Thomas against the defendant, averment of a trial at *nisi prius* at Dorchester, on 18th July, 1838, and that the defendant was then and there acquitted of the premises mentioned to be charged against him by John Thomas. And thereupon afterwards, to wit 22d November, 1838, it was considered, in and by the said court &c., amongst other things, that the said John Thomas be in mercy for his false claim against the now plaintiff defendant in the said last-mentioned action as aforesaid. Whereby the now plaintiff was not only put to great trouble and vexation, but was also obliged to pay, and did in fact pay, a large &c., to wit £800, in and about the defence of the said action.

The defendant pleaded, in effect, that the advice given by him was given in the character of an attorney.

Replication *de injuria*.

Special demurrer. Joinder.

Sir W. W. Follett, Solicitor-General, for the defendant.

Barstow, contra.<sup>1</sup>

LORD DENMAN, C. J. The case of Pechell v. Watson proceeded on the principle that to maintain an action already commenced was unlawful. That is not here charged; and therefore the count ought to show the ingredients which make the instigation to a suit actionable. The plaintiff has not done this; for, beyond all doubt, the absence of reasonable or probable cause is one such ingredient, in the absence of which it does not appear that the plaintiff has been unlawfully disturbed.

PATTESON, J. I think this declaration is bad, for the reason already given. The case is analogous to that of a complaint of malicious prosecution or arrest; and here, as there, the want of reasonable or probable cause ought to be alleged.

<sup>1</sup> The averments of the court are abridged and the arguments of counsel are omitted.  
— Ed.

WILLIAMS, J. The averments in this declaration might be sustained by proof that the defendant, not being an attorney, had held a conversation with Thomas, and had said, "If your story is correct, you might sue Flight." No action could be maintained on that, unless it further appeared that the now defendant knew that there was no right to sue the now plaintiff.

COLERIDGE, J. It is not asserted here that the suit maintained was without reasonable or probable cause: there are only general words, imputing an instigation and a stirring-up. There should be added to these, in strict analogy with actions for malicious prosecution or arrest, as my Brother Patteson has pointed out, an averment of want of reasonable or probable cause: and without such averment this declaration shows no right of action. *Judgment for defendant.*<sup>1</sup>

<sup>1</sup> Fivaz v. Nicholls, 2 C. B. 501, 514 (*semble*); Grove v. Brandenburg, 7 Blackf. 234 *Accord.*

"Pechell v. Watson came to be considered in Flight v. Lemman. Its authority was recognized, but the latter case was decided against the plaintiff, who sued for maintenance, on the ground, I own I should have thought the narrow ground, that to instigate a suit was not maintenance, though to support one already instituted was." *Per* COLERIDGE, C. J., in Bradlaugh v. Newdegate, 11 Q. B. D. 1, 8. — ED.



## SECTION VI.

*Malicious Abuse of Process.*

GRAINGER v. HILL AND ANOTHER.

IN THE COMMON PLEAS, JANUARY 20, 1838.

[Reported in 4 Bingham, New Cases, 212.]

TINDAL, C. J.<sup>1</sup> This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendant for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the mean time, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95 17s. 6d., and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained; by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgment.

The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same, — that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ; here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to

<sup>1</sup> Only the opinion of the learned Chief Justice upon the point of abuse of legal process is given. — Ed.

such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.<sup>1</sup>

<sup>1</sup> *Heywood v. Collinge*, 9 A. & E. 268; *Wicker v. Hotchkiss*, 62 Ill. 110 (*semble*); *Emery v. Ginnan*, 24 Ill. Ap. 65 (*semble*); *Page v. Cushing*, 38 Me. 523; *Wood v. Graves*, 144 Mass. 365; *Pixley v. Reed*, 26 Minn. 80 (*semble*); *Rossiter v. Minn. Co.*, 37 Minn. 296; *Bebinger v. Sweet*, 6 Hun, 478; *Buffalo Co. v. Everest*, 30 Hun, 586 (*semble*); *Hazard v. Harding*, 63 How. Pr. 326; *Prough v. Entriken*, 11 Pa. 81; *Mayer v. Walter*, 64 Pa. 283 *Accord*.

In *Wood v. Graves*, *supra*, ALLEN, J., said, p. 366: "There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is *Grainger v. Hill*, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope."

In *Mayer v. Walter*, *supra*, SHARSWOOD, J., said: "There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. Thus, if a man is arrested, or his goods seized in order to extort money from him, even though it be to pay a just claim other than that in suit, or to compel him to give up possession of a deed or other thing of value, not the legal object of the process, it is settled that in an action for such malicious abuse it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued out without reasonable or probable cause: *Grainger v. Hill*, 4 Bing. N. C. 212. It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise. We know that the law is good, but only if a man use it lawfully.

"On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously, but without reasonable or probable cause. It is clearly settled also, that the proceeding must be determined finally before any action lies for the injury; because, as it is said in *Arundell v. Tregono*, Yelv. 117, the plaintiff will clear himself too soon, viz., before the fact tried, which will be inconvenient; besides, the two determinations might be contrary and inconsistent."—ED.

## SECTION VII.

*Unauthorized Action in the Name of Another.*

## JAMES BOND v. JOSEPH CHAPIN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1844.

[Reported in 8 Metcalf, 31.]

HUBBARD, J.<sup>1</sup> In the present suit, which is an action on the case against the defendant for prosecuting a suit in the name of Thomas Bond against the plaintiff, the plaintiff avers, in his declaration, (which accompanies the exceptions,) that the defendant, without authority from said Thomas, and having no reasonable ground for believing that anything was due from the plaintiff to him, attached the plaintiff's property, and prosecuted said suit against him, from November term, 1840, to November term, 1841, when he became nonsuit; and evidence was offered tending to prove these allegations. The instructions to the jury were, that "the plaintiff must prove the former action to have been commenced and prosecuted maliciously, that is to say, with some improper motive, or without due care to ascertain his rights, as well as without authority, and without probable cause." The error complained of may have arisen from not distinguishing, during the trial, between an action on the case for malicious prosecution, and an action on the case for prosecuting a suit in the name of a third person, without authority, by reason of which the defendant sustains injury.

In a suit for malicious prosecution, the gist of the action is malice; but there must also exist the want of probable cause. And without the proof of both facts, the action cannot be maintained, though the existence of malice may often be inferred from the want of probable cause. But in an action on the case for damages for prosecuting a suit against the plaintiff without authority, in the name of a third person, the gist of the action is not a want of probable cause, — for there may be a good cause of action, — but for the improper liberty of using the name of another person in prosecuting a suit, by which the defendant in the action is injured. Nor is the proof of malice essential to the maintenance of such action. If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and acted upon that supposition, without malice, still if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him, in the loss

<sup>1</sup> Only the opinion of the court is given. — ED.

of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives — which may be inferred from there existing no right of action, as well as proved in other ways — then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation.

In this case, the learned judge having instructed the jury that a want of probable cause and malice must concur with the want of authority to commence the suit in the name of a third person, to enable the plaintiff to maintain the action, we think there was error in the instruction, and that though the damages might be enhanced by showing malice and a want of probable cause, yet that the proof of them is not essential to the maintenance of the action.

*New trial granted.*<sup>1</sup>

<sup>1</sup> Y. B. 7 Hen. VI. 43, pl. —; 1 Roll. Ab. 101, pl. 1, s. c.; *Holliday v. Sterling*, 62 Mo. 321 *Accord.* — ED.

## CHAPTER V.

MALICIOUS INJURY TO THE PLAINTIFF BY INFLUENCING  
THE CONDUCT OF A THIRD PERSON.

## SECTION I.

*By Inducing or Aiding a Third Person to commit a Breach of  
a Legal Duty to the Plaintiff.*

(a) THE DUTY OF A SERVANT TO HIS MASTER.

## HART v. ALDRIDGE.

IN THE KING'S BENCH, MAY 3, 1774.

[Reported in Cowper, 54.]

THIS came before the court on a case reserved upon the following question: Whether under the circumstances of this case the plaintiff was entitled to recover? It was an action of trespass on the case for enticing away several of the plaintiff's servants, who used to work for him in the capacity of journeymen shoemakers. The jury found that Martin and Clayton were employed as journeymen shoemakers by the plaintiff, but for no determinate time, but only by the piece, and had, at the time of the trespass laid, each of them a pair of shoes unfinished; that the defendant persuaded them to enter into his service, and to leave these shoes unfinished, which they accordingly did.

*Mr. Darwell*, for the plaintiff, stated it to be a question of common law, and that the only point for the opinion of the court was, "whether a journeyman was such a servant as the law takes notice of?" In support of which proposition he insisted that a journeyman is as much a servant as any other person who works for hire or wages; that neither in reason nor at common law is there any distinction between a servant in one capacity or another, and that the injury of seduction is in all cases the same, though the recompense in damages may be different. To show that an action lay at common law for taking a servant out of his master's service, he cited Brooke Abr. tit. *Action sur le case*, pl. 38; 11 Hen. IV., fol. 23, pl. 46. In Fitzherbert, 168 D, it is laid down that "if a man take an infant or other out of another's service, he shall be punished, although the infant or other were not retained." In Brooke, tit. Lab. p. 21, a distinction is taken between the taking a servant out of his master's service and the procuring him to depart or retaining him after a voluntary departure, being apprised of his first retainer: in the two last of which cases an action on the case is the proper remedy; in

the former, trespass at common law. But he insisted that in no case had there ever been a distinction taken with respect to the time for which a servant might be hired; nor indeed before the stat. 5 Eliz. c. 4, was any precise time necessary, the object of which statute was very different from the question before the court. He pressed the argument *ab inconvenienti*, stating that it would be of great detriment to the town, where the whole trade was in a great measure carried on by this sort of servant. That the verdict had found the defendant to be apprised of the retainer of the servants, it being in proof that he had desired them to leave their work then in hand unfinished.

*Mr. Wiles*, contra. The single question is, whether the enticing away a journeyman shoemaker, who is hired to make a single pair of shoes, is such an injury to his master as that an action will lie for it. Now the jury have found that there was no hiring for any determinate time, but only by the piece: if so, they could not be the plaintiff's servants; for the term "journeyman" does not import that they belong to any particular master.

LORD MANSFIELD interrupted him. The question is, whether saying that such a one is a man's journeyman, is as much as to say that he is such a man's servant; that is, whether the jury, by finding him to be the plaintiff's journeyman, do not *ex vi termini* find him to be his servant. A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.

What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master; but the gist of the present action is that they were attached to this particular master.

ASTON, J. It is clear that a master may maintain an action against any one for taking and enticing away his servant, upon the ground of the interest which he has in his service and labor.<sup>1</sup> And even suppos-

<sup>1</sup> Gunter v. Astor, 4 Moore, 12; Hartley v. Cummings, 5 C. B. 247; Jones v. Blocker, 43 Ga. 331; Wharton v. Jossey, 46 Ga. 578; Lee v. West, 47 Ga. 311 (*semble*); Bundy v. Dodsan, 28 Ind. 295; Jones v. Tevis, 4 Litt. 25; Tyson v. Ewing, 3 J. J. Marsh. 185; Carew v. Rutherford, 106 Mass. 1; Bixby v. Dunlap, 56 N. H. 456; Stille v. Jenkins, 3 Green (N. J.), 302; Scidmore v. Smith, 13 Johns. 322; Covert v. Gray, 34 How. Pr. 450; Stout v. Woody, 63 N. Ca. 37; Haskins v. Royster, 70 N. Ca. 601; Robinson v. Culp, 3 Brev. 302; Fowler v. Stonum, 6 Tex. 60 *Accord*.

See, also, Martinez v. Gerber, 3 M. & G. 88. — ED.

ing, as my lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant *quoad hoc*, and though the seducer and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Justice WILLES and Mr. Justice ASHHURST concurred.

*Per Curiam.* Let the *postea* be delivered to the plaintiff.

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BLAKE v. LANYON.

IN THE KING'S BENCH, APRIL 25, 1795.

[*Reported in 6 Term Reports, 221.*]

THE second count in the declaration stated that the plaintiff, who was a currier, had hired and retained W. Hobbs to be his servant and journeyman, &c., and that Hobbs, against the will of the plaintiff, departed and left the service of the plaintiff, &c., and then and there went to the defendant; yet the defendant, well knowing Hobbs to be the servant of the plaintiff, and to have been and to be so retained, hired, and employed by the plaintiff, &c., but contriving, &c., “did then and there receive and harbor the said W. Hobbs, and did then and there retain, keep, and employ the said Hobbs in his (defendant’s) said service, and wholly refused to deliver him to the plaintiff his master,” although requested, &c., and unlawfully detained, entertained, and kept the said Hobbs, so then being the servant and journeyman of the plaintiff, in his (the defendant’s) service, &c., whereby, &c. At the trial at the last Launceston assizes it appeared that Hobbs, who was retained by the plaintiff to work by the piece, left the plaintiff’s service on a dispute between them, the plaintiff having beaten him; that at the time of his departure he had some work in hand; that he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff; but that, in the course of a few days afterwards, the defendant having been apprised by the plaintiff that Hobbs was his servant and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work. This Hobbs refused, and the defendant continued him in his service. It was objected on behalf of the defendant that the action could not be supported on the second count, because it either imported that the defendant had retained Hobbs in his service, knowing him to be the servant of the plaintiff, which was not established in proof, or that he merely continued Hobbs in his service after he had notice of Hobbs’s engagement with the plaintiff, for

which no action could be maintained, it appearing that the defendant did not know that Hobbs was the plaintiff's servant at the time he first employed him. But Lawrence, J., before whom the cause was tried, overruled the objection, saying that the plaintiff might recover upon the second count if the jury were of opinion that the defendant continued to employ Hobbs after he knew that Hobbs was the plaintiff's servant. The jury having given a verdict for the plaintiff,

*Gibbs* now renewed his objection, stating that great inconveniences would result from a determination against the defendant, for that, in such a case, a person engaged in a great manufacture might be deprived of the benefit of the service of a journeyman whom he had retained to do a particular piece of work, not knowing at the time of hiring that the journeyman was under any engagement with any other master, before the servant had finished his work, and at a moment when the materials then in work might be totally spoiled if left in an unfinished state.

*Sed per Curiam.* An action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away. Here no fault could be imputed to the defendant for taking Hobbs into his service in the first instance, because then he had no notice of Hobbs's prior engagement with the plaintiff;<sup>1</sup> but, as soon as he had notice of that fact, he ought to have discharged him. A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service.

*Rule refused.*<sup>2</sup>

## EAGER v. GRIMWOOD.

IN THE EXCHEQUER, JUNE 1, 1847.

[Reported in 1 *Exchequer Reports*, 61.]

TRESPASS for assaulting and debauching the daughter and servant of the plaintiff, whereby she then became pregnant, &c., and the plaintiff lost and was deprived of her services. Plea: Not guilty.

At the trial before Pollock, C. B., at the London sittings after last Michaelmas term, the following facts appeared: The connection between the defendant and the plaintiff's daughter took place for the

<sup>1</sup> *Eades v. Vandeput*, 5 East, 39 n. (a); *Sherwood v. Hall*, 3 Sumn. 127; *Ferguson v. Tucker*, 2 Har. & G. 182; *Butterfield v. Ashley*, 6 Cush. 249; *Sargent v. Mathewson*, 38 N. H. 54; *Stuart v. Simpson*, 1 Wend. 376; *Caughy v. Smith*, 47 N. Y. 244; *Bell v. Lakin*, 1 McMull. 367; *Conant v. Raymond*, 2 Aik. 243 *Accord.* — Ed.

<sup>2</sup> *Fawcett v. Beavres*, 2 Lev. 63; *Pilkington v. Scott*, 15 M. & W. 657; *Kennedy v. McArthur*, 5 Ala. 151; *Dacy v. Gay*, 16 Ga. 203; *Everett v. Sherfey*, 1 Iowa, 356; *Stowe v. Heywood*, 7 All. 218; *Sargent v. Mathewson*, 38 N. H. 54 *Accord.*

*Adams v. Bafeald*, 1 Leon. 240 *Contra.* — Ed.



first time two days after Christmas-day, 1844. In June, 1845, the plaintiff's daughter gave birth to a child, which, according to the evidence of a surgeon, was a full-grown child. It also appeared that the plaintiff had been put to some expense in consequence of his daughter's illness. The learned Chief Baron left it to the jury to say whether or no the defendant was the father of the child; and he told them that if they believed he was not the father of the child, they should find a verdict for him. The jury having found for the defendant,

*Prentice* obtained a rule *nisi* for a new trial, on the ground of misdirection, against which

*Humfrey* showed cause.

*Prentice*, in support of the rule.<sup>1</sup>

POLLOCK, C. B. The case of *Grinnell v. Wells*<sup>2</sup> is precisely in point. That case decided that an action for seduction cannot be maintained without proof of loss of service. Tindal, C. J., in delivering the judgment of the court, says: "The foundation of the action by a father to recover damages against the wrong-doer, for the seduction of his daughter, has been uniformly placed from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." The rule must be absolute to enter a nonsuit, unless the plaintiff will consent to a *stet processus*.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

*Rule accordingly.*<sup>3</sup>

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> 7 Man. & G. 933.

<sup>3</sup> "The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant, and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases the master may maintain an action, because the loss of services is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 M. & W. 738; *Knight v. Wilcox*, 14 N. Y. 413.

"In the case at bar, as the ruling appears to have been general that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted." — *Per* MORTON, J., in *Abrahams v. Kidney*, 104 Mass. 222. See to the same effect *Blagg v. Ilsley*, 127 Mass. 191; *White v. Nellis*, 31 N. Y. 405; *Ingersoll v. Miller*, 47 Barb. 47. — ED.

SECTION I. (*continued*).

## (b) THE DUTY OF A WIFE TO HER HUSBAND.

## WINSMORE v. GREENBANK.

IN THE COMMON PLEAS, OCTOBER 26, 1745.

[*Reported in Willes, 577.*]

IN order to understand the grounds of the motion in arrest of judgment, it is necessary to state some parts of the record.

The declaration contained four counts.<sup>1</sup> The first stated that on the 1st of January, 1741, Mary, then and until the 24th of December, 1742, being the wife of the plaintiff (but since deceased), unlawfully and without his leave and against his consent departed and went away from him, &c., and lived and continued absent and apart from him from thence until and upon the 8th of August, 1742; and during the said time that the said Mary so lived and continued absent, a large estate, both real and personal, to the value of £30,000, was devised to her by W. Worth, D. D., her late father, for her sole and separate use, and at her sole and separate disposal; that thereupon she was desirous of being and intended to be again reconciled to the plaintiff, and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled, &c.), yet the defendant, knowing the said premises and having notice of the said Mary's intention, but contriving to injure the plaintiff, and to prevent Mary, the wife, from being reconciled to him, &c., and to prevent the plaintiff receiving any advantage from the said real and personal estate, &c., on the 8th of August, 1742, unlawfully and unjustly persuaded, procured, and enticed the said Mary to continue absent and apart from the plaintiff, and to secrete, hide, and conceal herself from the plaintiff, by means of which persuasion, procuration, and enticement the said Mary, from the said 8th of August, 1742, until the time of her death on the 24th of December, 1742, continued absent and apart, and secreted herself, &c.; whereby the plaintiff during all that time totally lost the comfort and society of his said wife, and her aid and assistance in his domestic affairs, and the profit and advantage that he would and ought to have had of and from the said real and personal estates, &c., and was put to great charges and expenses in endeavoring to find out and gain access to his said wife, in order to persuade and procure her to be reconciled to him.

The defendant pleaded not guilty; and the jury found a verdict for the plaintiff on the three first counts, and gave £3,000 damages, and a verdict for the defendant on the last.

<sup>1</sup> Only the report of the case on the first count is given. — Ed.

This case was argued on the 18th and 26th of November, 1745, and the 29th of January following, by *Skinner* and *Willes*, King's Serjeants, and *Draper* and *Haywood*, Serjeants, for the defendant, in support of the motion in arrest of judgment, and by *Prime* and *Birch*, King's Serjeants, and *Bootle*, Serjeant, for the plaintiff; and on the 1st of February following the rule to arrest the judgment was discharged.

WILLES, Lord Chief Justice, delivered his opinion, to the following effect:—

Several objections have been taken by the defendant to this declaration in arrest of judgment: two general ones, and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case.

The first general objection is, that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81 *b*, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be new facts in every special action on the case.

The second general objection is, that there must be *damnum cum injuria*; which I admit. I admit, likewise, the consequence, that the fact laid before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid, by which he lost it, be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie.

This rule, therefore, being admitted, the only question is, whether any such injury be laid here; and this rule will properly come to be considered under the several objections made to the particular counts; for if any of them hold, then no injury is laid. I admit, also, that as the verdict is on three counts, and the damages are entire, if either of the counts be bad, the judgment must be arrested.

The principal objections were to the first count, and they were three.

First, that procuring, enticing, and persuading are not sufficient, if no ill consequence follows from it.

Secondly, that unlawfully and unjustly will not help the case; but the particular methods made use of should have been stated by which the defendant procured, &c., otherwise this is leaving the law to a jury.

Thirdly, that no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers.

First, That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, &c.

Secondly, Whether "enticing" goes so far or not I will not nor need determine, because "procuring" is certainly "persuading with effect." I need not cite any authority for this; because every one who understands the English language knows that this is the common acceptation of that word.

Secondly, But, to be sure, it must be an unlawfully procuring, and that brings me to the second objection. It is not necessary to set forth all the facts to show how it was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. It was said, however, that at least it was necessary for the plaintiff to add, "by false insinuations;" but it is not material whether they were true or false; if the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as *burglariter*, *felonice*, *proditorie*, *devisavit vel non*, *demisit vel non*. But the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbor, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which *Penruddock's Case*<sup>1</sup> was cited, and many others might have been quoted, the law is certainly so, and the reason of it is obvious, but that reason does not extend to the present case; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so.

Several arguments were urged and several cases were cited on both sides of the question, whether defects in this declaration were or were not aided by the verdict; but I shall not take notice of them, because I am of opinion that there are no defects to be cured, and that the declaration would have been good even on a demurrer. Had the words "unlawfully and unjustly" been omitted, this question might have been material, because it is lawful in some instances for the wife to leave the husband; but as the declaration is framed, it is not necessary to enter into the consideration of that question. Many observations were likewise made on the *quantum* of the damages given by the jury,

<sup>1</sup> 5 Co. 100, 101.

and it was said that it was uncertain whether or not the husband had sustained any; those were proper observations on the motion for a new trial (which has been already disposed of), but cannot have any weight on this motion in arrest of judgment, where everything laid in the declaration must be taken to have been proved. I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

ABNEY, J., and BURNETT, J., gave their opinions *seriatim*, agreeing with the Lord Chief Justice. *Rule discharged.*<sup>1</sup>

- 4 -  
PHILP v. SQUIRE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JULY 28, 1791.

[Reported in Peake, 82.]

THIS was an action on the case for harboring the plaintiff's wife after notice from the plaintiff not to do so.

It appeared that the plaintiff's wife came to the house of the defendant (to whose wife she was related) and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors. Upon this representation the defendant received her into his house, and, at her request, suffered her to continue there after he had received notice from the husband not to harbor her. It was not proved that the husband had in fact ill-treated his wife.

LORD KENYON. The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behavior he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is

<sup>1</sup> Higham v. Vanosdol, 101 Ind. 160; Hadley v. Hayward, 121 Mass. 236; Modisett v. McPike, 74 Mo. 634, 648; Rinehart v. Bills, 82 Mo. 534; Hutcheson v. Peck, 5 Johns. 207, 208; Heermance v. James, 47 Barb. 120; Barbee v. Armstead, 10 Ired. 530; Rabe v. Hanna, 5 Oh. 530; Holtz v. Dick, 42 Oh. St. 23 *Accord*.

ACTION BY A WIFE FOR THE ENTICEMENT OF HER HUSBAND. — It is generally agreed that the removal of a married woman's disability to sue at law in her own name enables her to maintain an action against one who, by improper persuasion, deprives her of her husband's society. Mehrhoff v. Mehrhoff, 26 Fed. R. 13; Foot v. Card, 58 Conn. 1; Bassett v. Bassett, 20 Ill. Ap. 543; Bennett v. Bennett, 116 N. Y. 584 (overruling Van Arnam v. Ayers, 67 Barb. 544); Jaynes v. Jaynes, 39 Hun, 40; Breiman v. Paasch, 7 Abb. N. C. 249; Baker v. Baker, 16 Abb. N. C. 293; Warner v. Miller, 17 Abb. N. C. 221; Churchill v. Lewis, 17 Abb. N. C. 226; Simmons v. Simmons, 21 Abb. N. C. 469; Westlake v. Westlake, 34 Oh. St. 621; Clark v. Harlan, 1 Cincin. S. C. 413. See, also, Lynch v. Knight, 9 H. L. C. 577.

But see, *contra*, Logan v. Logan, 77 Ind. 558 (Elliott, C. J., and Woods, J., dissenting); Duffies v. Duffies, 76 Wis. 374. — Ed.

of no consequence whether the wife's representation was true or false. This kind of action materially differs from that for harboring an apprentice, the ground of the action in that case being the loss of the apprentice's service.<sup>1</sup>

The plaintiff was nonsuited.<sup>2</sup>

# T. J. TASKER v. E. E. STANLEY AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JAN. 12, 1891.

[Reported in 153 Massachusetts Reports, 148.]

HOLMES, J.<sup>3</sup> These are actions for procuring and enticing the plaintiff's wife to live separately from him. They are not actions of the type of *Lynch v. Knight*,<sup>4</sup> brought for a slander in consequence of which his wife left him, but they are brought for persuasions which may have been based wholly upon the truth. That is all that is alleged in the declarations, and, so far as appears from the bill of exceptions, there was no evidence offered that the defendants spoke any falsehoods, or that their conduct was unlawful for any other reason than its tendency to produce a separation. *Winsmore v. Greenbank*.

True statements and honest advice would have done no harm but for the subsequent act of the wife, an independent and responsible person. The defendants had a right to deny their intent to bring about that act. See *Robbins v. Fletcher*,<sup>5</sup> *Snow v. Paine*,<sup>6</sup> *Commonwealth v. Damon*.<sup>7</sup> And probably they would not be liable for it unless they intended it. See *Tutein v. Hurley*,<sup>8</sup> *Hastings v. Stetson*,<sup>9</sup> *Jones v. Goodwillie*,<sup>10</sup> *Clif-*

<sup>1</sup> But see as to an innocent harboring of an apprentice, *Clerk & Lindsell, Torts*, 157. — ED.

<sup>2</sup> Y. B. 20 Hen. VII. 2, pl. 4; *Berthon v. Cartwright*, 2 Esp. 480; *Turner v. Estes*, 3 Mass. 317; *Stowe v. Heywood*, 7 All. 118; *Modisett v. McPike*, 74 Mo. 636, 648; *Hutcheson v. Peck*, 5 Johns. 196; *Barnes v. Allen*, 1 Abb. Ap. 111, 1 Keyes, 390, s. c. (reversing s. c. 30 Barb. 663); *Schoeneman v. Palmer*, 4 Barb. 225; *Bennett v. Smith*, 21 Barb. 439; *Campbell v. Carter*, 3 Daly, 165; *Friend v. Thompson*, *Wright (Ohio)*, 636; *Holtz v. Dick*, 42 Oh. St. 23, 28; *Payne v. Williams*, 4 Baxt. 583 *Accord*.

"The *quo animo* ought then, in this case, to have been made the test of inquiry and the rule of decision." — *Per KENT, C. J.*, in *Hutcheson v. Peck*, *supra*, p. 210. "The material point of inquiry is the intent with which the defendant has acted. . . . It must appear that the defendant acted with improper motives." — *Per HARRIS, J.*, in *Schoeneman v. Palmer*, *supra*, p. 226. "The act is rendered tortious or wrongful by reason of the unlawful or improper motive which is alleged to have prompted it. The unlawful motive or design is charged in the complaint and is the very *gravamen* of the action. It was the essential feature without which the act was perfectly harmless and lawful." — ED.

<sup>3</sup> Only the opinion of the court is given. — ED.

<sup>4</sup> 9 H. L. Cas. 577.

<sup>5</sup> 101 Mass. 115, 117.

<sup>6</sup> 114 Mass. 520.

<sup>7</sup> 136 Mass. 441, 449.

<sup>8</sup> 98 Mass. 211.

<sup>9</sup> 126 Mass. 329.

<sup>10</sup> 143 Mass. 281.

ford v. Atlantic Cotton Mills,<sup>1</sup> Elmer v. Fessenden,<sup>2</sup> Vicars v. Wilcocks,<sup>3</sup> Ward v. Weeks,<sup>4</sup> Radley v. London & Northwestern Railway,<sup>5</sup> Milwaukee & St. Paul Railway v. Kellogg,<sup>6</sup> Cuff v. Newark & New York Railroad.<sup>7</sup>

If the defendants did intend to induce a separation, they had a right to show that their advice was given honestly, with a view to the welfare of both parties. For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that, if she keeps away from him for three years, he may get a divorce. A married woman must be supposed to be capable of receiving advice to separate from her husband without losing her reason or responsibility. Considering the present state of the law as to the act advised (an important consideration, *State v. Goode*<sup>8</sup>), and as to the person to whom the advice is given, it is proper to allow a larger privilege than in the case of false statements. Good intentions are no excuse for spreading slanders. But in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases. *Walker v. Cronin*, *Barnes v. Allen*,<sup>9</sup> *Hutcheson v. Peck*,<sup>10</sup> *Modisett v. McPike*,<sup>11</sup> *Rinehart v. Bills*,<sup>12</sup> *Pollock, Torts* (2d ed.) 479, 480; *Bowen v. Hall*, *Lumley v. Gye*.

Evidence of the plaintiff's statement, that he was going to make as dirty a case of it as he could for certain of the defendants, was admissible as tending to show bias and to discredit his testimony. *Day v. Stickney*.<sup>13</sup>

*Exceptions overruled*.<sup>14</sup>

## HOARD v. PECK.

IN THE SUPREME COURT, NEW YORK, OCTOBER, 1867.

[Reported in 56 *Barbour*, 202.]

FOSTER, J.<sup>15</sup> The facts claimed in the complaint, and proved on the trial, were as follows: The plaintiff and his wife were residents of the

<sup>1</sup> 146 Mass. 47, 49.

<sup>3</sup> 8 East, 1, 3.

<sup>5</sup> 1 App. Cas. 754, 759.

<sup>7</sup> 6 Vroom, 17, 30, *et seq.*

<sup>9</sup> 1 Abb. (N. Y. App.) 111.

<sup>11</sup> 74 Misso. 636, 648.

<sup>13</sup> 14 Allen, 255.

<sup>2</sup> 151 Mass. 359, 362.

<sup>4</sup> 7 Bing. 211, 215.

<sup>6</sup> 94 U. S. 469, 475.

<sup>8</sup> 1 Hawks, 463, 464.

<sup>10</sup> 5 Johns. 196.

<sup>12</sup> 82 Misso. 534, 537.

<sup>14</sup> *Modisett v. McPike*, 74 Mo. 686 (*semble*); *Hutcheson v. Peck*, 5 Johns. 196 (*semble*); *Bennett v. Smith*, 21 Barb. 439 (*semble*); *Holtz v. Dick*, 42 Oh. St. 23 (*semble*) *Accord.* — Ed.

<sup>15</sup> Only the opinion of the court is given, and that, too, is abridged. — Ed.

village of Watertown, in the county of Jefferson. They had two children. The wife of the plaintiff, previous to January, 1866, enjoyed good health, and had the charge of the plaintiff's household affairs, and of the children. The defendant had been for some years a druggist, in that village, and knew the plaintiff and his wife. From January, 1866, to October of that year, the defendant from day to day secretly sold to the wife, to be used by her as a beverage, and which she did use as a beverage, large quantities of laudanum, ranging from four to twelve ounces per day, which the defendant knew was used by her as a beverage, without the knowledge or consent of the plaintiff; and well knowing, while he was so selling the laudanum to her, that it was injuring and impairing her health; and concealing the fact of such sales, and use thereof, from the plaintiff; and from the use of the drug the wife of the plaintiff became sick and emaciated, and her mind was affected, so that she was unable to perform her duties as such wife, and her affections became alienated from the plaintiff, and he lost her affections and society, and was compelled to expend divers sums of money in the medical and other attendance upon her in effecting a cure.

The main question is, can the plaintiff, upon such a state of facts, maintain an action.

It is claimed for the defendant, that the selling of laudanum is a lawful business, and that therefore no action will lie against him; that it is like the selling of intoxicating liquors, the selling of which he claims is lawful, except so far as restrained by positive statutory enactment. And it is also claimed that, whether lawful to sell it or not, the wife having voluntarily used it, the defendant not having assisted her in the act of taking it, therefore he is not liable for the injury caused by her use of it.

Although there is no statute prohibiting the sale of laudanum, either as a beverage or for any other purpose, it does not follow that therefore a sale of it in all cases is lawful. Its lawfulness, or unlawfulness, depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied.

The sale of laudanum as a beverage is very uncommon. It is well known to be poisonous. It cannot be used as a beverage without impairing the physical and mental energies; and this is generally well known, and it certainly is to all druggists. Suppose a druggist should clandestinely, three times a day, sell to a wife, to be *then* and *there* drunk *in his presence*, and having every reason to believe that it was against the consent and will of the husband, four ounces of laudanum, amounting in the whole to twelve ounces per day, and should continue to do so for the term of nine months, seeing and knowing during all that time that it was destroying her intellect, impairing her health, and inflicting injury upon the husband; is it possible that the law would afford no redress to the party aggrieved, or would it be any justification that the wife desired it? or, that it was her hand that held the



potion to her lips? The druggist, by the act of handing it to her for that purpose, is as much responsible for the consequences as though he assisted her directly in pouring it down her throat. If this were an action for negligence of the defendant, negligence of the wife would prevent the plaintiff from recovering, on the ground that her negligence contributed to the injury; but it is a case where the druggist and wife united in the doing of acts injurious to the interests of the husband. In my judgment it might as well be said, if a stranger and a servant conspired together to injure the property of the master, the stranger furnishing the means and the servant alone using them in inflicting the injury, that the master cannot recover of the stranger, because his act is not the immediate one in producing it. The action in such case would lie against the stranger, because he acted in concert with the servant, and because his act aided in the consummation of the injurious act.

In this case, the wife and defendant united and acted in concert, in doing the wrong complained of, and if the defendant had performed his duty to the plaintiff, by informing him what they were doing, the result which was reached would have been prevented.

If one arms another with a weapon to be used by him upon the person of a third, and it is so used, the one furnishing it is a participator in the whole transaction, and liable for the result, although not present when it was accomplished, and notwithstanding the person to whom the weapon was furnished might, for aught he knew, finally resolve not to use it. If one furnishes the means, with the knowledge that it is to be unlawfully used, assenting to such use, he is answerable for the consequences, if the design is carried out.

It is said by the counsel for the defendant, that in general, to maintain a claim for special damages, they must appear to be the legal and natural consequences of the wrong complained of, and proceeding exclusively from that, and not from the improper act of a third person, remotely induced thereby. *Crain v. Petrie*.<sup>1</sup> The rule as laid down was properly applicable to that case, but I cannot see how it aids this defendant. In this case the wife of the plaintiff occupied no such relation to the defendant as was there meant by the term *third person*. Nor was she remotely induced by the act of the defendant to take the injurious drug. They were associated together and acting in concert in the commission of the wrong, she being induced by the desire for the exhilaration produced by the use of it, and he by the desire of gain, and his was no *remote* act. The law regards each sale (under the circumstances proved) as one and the same transaction; as much as though each *sale* and *use* had been at the same instant of time.

There are no decisions upon any case identically the same as the one under consideration. It does not however prove, because the case

<sup>1</sup> 6 Hill, 522.

is new, that the action cannot be maintained. The action is adapted to every special invasion of one's rights.<sup>1</sup> And it is no objection to an action, that it is new, in the instance, if it be not new in its principle.

I think the rule is general, "that he who knowingly assists the wife in the violation of her duty, as such, is guilty of a wrong for which an action will lie, where injury is thereby inflicted upon the husband." *Barnes v. Allen.*<sup>2</sup>

In the language of the counsel for the plaintiff, his wife did not *apply* for the laudanum of the defendant, as a medicine, and he knew it; it was not *intended* to be used as a medicine, and he knew it; she was violating her duty to her husband in purchasing and using the drug; violating her duty to her family, and destroying her health, and the defendant knew it. He aided her, and furnished her with the means of doing all this. The very sale to her of the poison, and the using of it as she did, destroyed her volition, and so perverted her judgment that she had no moral power to resist the temptation to continue its use. This habit, so resistless in its tyranny, was the sequence of the sale of the drug to her, by the defendant, and he knew it. He was, in fact, for a portion of the time, selling it to a morally insane person, whose insanity was caused by his own wrong. And I may add that the proof shows, by his own declarations, that he sold it to be used by her, when he believed she was not in her right mind. He continued to sell it to her, and kept it secret from the plaintiff. He acted in bad faith towards him, and his acts having contributed largely to the injury complained of, he is liable.

The order of the special term denying a new trial should be affirmed, and judgment entered for the plaintiff.

BACON and MULLIN, JJ., concurred; MORGAN, J., dissented.

*Order of the special term affirmed, and judgment entered for the plaintiff.*

<sup>1</sup> 1 Comyn's Dig., title Action, A, note 1; 4 Burr. 2345.

<sup>2</sup> 30 Barb. 668, *per* Lott, J.

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CRIMINAL CONVERSATION. — The husband may maintain an action against one for illicit intercourse with his wife, whether the result of seduction or not. *Weedon v. Timbrell*, 5 T. R. 357 (*semble*); *Wales v. Miner*, 89 Ind. 118; *Wood v. Mathews*, 47 Iowa, 409; *Hadley v. Heywood*, 121 Mass. 236.

In an action for ravishing one's wife, no loss of service need be proved. *Bigaouette v. Paulet*, 134 Mass. 123. — Ed.

SECTION I. (*continued*).

## (c) THE DUTY OF A CONTRACTOR.

## JOHN ALDRIDGE v. PETER G. STUYVESANT.

IN THE SUPERIOR COURT, CITY OF NEW YORK, OCTOBER, 1828.

[*Reported 1 Hall, 210.*]

OAKLEY, J.<sup>1</sup> This is a special action on the case. The first count of the declaration sets forth, in substance, that the plaintiff was possessed of the unexpired term of a certain house, and demised the same for one year to certain persons, who entered, and were in the quiet possession of the same as the tenants of the plaintiff: that the defendant knowing that they rightfully so held possession, as tenants of the plaintiff, and *wrongfully and maliciously intending to injure the plaintiff*, came to the premises, and threatened to seize the goods of the tenants then lying on the premises: that by *means of such wrongful and malicious act* of the defendant, he caused the tenants to remove from the premises, whereby the plaintiff lost his tenants; the said premises became vacant and unoccupied for a long period, and the said plaintiff lost the rents and profits of the said house during such period.

The second count states the letting of the premises, as in the first; and the entry and quiet possession of the tenants, and the knowledge of the defendant that they were rightfully in possession, and that the defendant *wrongfully and maliciously* intending to injure the plaintiff, threatened to seize the goods of the tenants living on the premises, if they did not remove from the same: by means of which he caused the tenants to abandon the possession, and the plaintiff thereby lost his tenants and his *rents, which he would otherwise have received from the tenants*: that he was unable to procure other tenants for the premises, and that they remained vacant and unoccupied, and *were greatly dilapidated by reason thereof*.

The third count sets forth a *malicious disturbance* of the tenants by the defendant, with the intent to deprive the plaintiff of his tenants, and prevent the occupation of the premises, and then avers, that by means thereof the tenants were obliged to abandon, and did abandon the premises; that the plaintiff thereby lost his tenants and his rents, which he would otherwise have received, and that the said premises remained vacant for a long period, during which they were greatly injured by means of their being so vacant.

To this declaration there is a general demurrer, and the question is whether, in either of the said counts, a sufficient cause of action is disclosed.

It is believed that this is an action of the first impression; but that is no objection to maintaining it, if it appears to fall fairly within established principles.

<sup>1</sup> Only the opinion of the court is given. — Ed.

In Com. Dig. (tit. Action on the Case for Misfeasance, A. 6) it is laid down that if a man threatens the tenants of another, *whereby they depart from their tenures*, an action lies. On referring to 1 Roll. Abr. which is cited in Comyns, and to the Year-Book (9 H. VII. p. 8), it appears that the tenants spoken of were tenants *at will*, who could dissolve their tenancy, or *depart from their tenures* at pleasure.

In the present case, the tenants, being tenants for years, could not, in judgment of law, depart from their tenures, though they might abandon the possession of their premises. The averment in the declaration, therefore, that the plaintiff lost his tenants, does not seem to set forth such an injury or damage as the law can notice. The case, however, in Comyns seems to establish the principle, that if a man, by interference with the tenants of another, or by disturbing or threatening them, causes damage to the landlord, an action will lie against him.

In *Pasley v. Freeman*,<sup>1</sup> it was held that a false affirmation made by the defendant *with the intent to defraud the plaintiff*, *whereby the plaintiff receives damage*, is the ground of an action, though the defendant is in no way benefited by it, and does not act in collusion with the person who is.

In *Yates v. Joyce*,<sup>2</sup> the second and third counts of the declaration set forth in substance that the plaintiff had a judgment against A., which was a lien on a certain lot of land; that A. had no other property to satisfy the judgment, and was insolvent; and that the plaintiff caused the said lot to be taken in execution on the judgment. It was then averred, that the defendant knowing the premises, but *intending to defraud the plaintiff* of the recovery of satisfaction of the judgment, demolished certain buildings on the lot, whereby the lot became of less value, and the plaintiff lost the benefit of his judgment to that amount. To these counts in the declaration there was a general demurrer; but the action was sustained. The court said, that the declaration showed, that the plaintiff had sustained damage by the act of the defendant, which he alleged was done fraudulently, and with the intent to injure him. Trespass, say they, will not lie, for the plaintiff was not in possession. If, then, there is any remedy for him, it is in this form of action; and they go on to lay down the general principle as a sound one, that where "the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages."

In that case, it will be remarked, that the immediate injury done by the defendant, by the destruction of the buildings, was to the *owner* or *possessor* of the land, who might clearly have had his action for the trespass. But the court count on the fraud, that because the defendant knew the plaintiff's right, and the interest he had in the land by virtue of his judgment, and *intended an injury to him*, he should be responsible.

It seems to me that the facts set forth in the declaration in this case,

<sup>1</sup> 3 D. & E. 51.

<sup>2</sup> 11 Johns. Rep. p. 136.

and particularly in the third count, bring it fairly within the principles established in the cases above alluded to. The plaintiff's allegation substantially is, that the defendant, knowing that he was the rightful possessor by his tenant of the premises in question, *and wrongfully and maliciously intending to injure him*, so disturbed his tenants, that they abandoned the possession, whereby he lost his rent, which he would have received if they had continued in possession, and the premises sustained injury and dilapidation, by reason of being vacant and unoccupied for the remainder of the year. Here is certainly damage to the plaintiff, and it is alleged to have been caused by the wrongful and malicious act of the defendant, committed with a full knowledge that he was violating the plaintiff's rights, and with the intent to injure him. The case seems in all respects to come within the general principle laid down by the court in *Yates v. Joyce*.

It is said, however, that the tenant had no right to abandon the possession of the premises on account of the disturbance by the defendant; and that if the plaintiff had sustained the injury complained of, it is owing to the wrongful act of the tenants, and the plaintiff's remedy is against them. It does not follow, in my judgment, that because the tenants had violated their contract with the plaintiff, and are liable to him for the rent, that the defendant is to be excused from liability. The defendant has wrongfully, and with the intent to injure the plaintiff, caused the tenants to abandon the premises, and the damage, which is the *gist* of the action, is charged directly to his wrongful act towards the plaintiff.

Thus there are in the case *damnum et injuria*, and where these are found united, they always constitute the ground of an action. I am of opinion that the plaintiff is entitled to judgment on the demurrer.

*Judgment for the plaintiff on the demurrer, with leave to the defendant to withdraw the same on payment of costs.*<sup>1</sup>

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### LUMLEY v. GYE. *Important.*

IN THE QUEEN'S BENCH, TRINITY TERM, 1853.

[Reported in 2 *Ellis & Blackburn*, 216.]

CROMPTON, J.<sup>2</sup> The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before

<sup>1</sup> Y. B. 14 Ed. IV. 7, pl. 3; Y. B. 9 Hen. VII. 7, pl. 4; Pollock, Torts (2d ed.), 212 n. (h) *Accord*. — Ed.

<sup>2</sup> The statement of case and arguments of counsel are omitted. — Ed.

the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred; and the question for our decision is, Whether all or any of the counts are good in substance?

The effect of the two first counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and *had become and was* the dramatic artiste of the plaintiff for reward to her; and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be

contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. . . .<sup>1</sup>

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of

<sup>1</sup> The learned judge here discussed and approved of *Blake v. Lanyon*. — Ed.

action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. . . .<sup>1</sup>

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. *Cowling* is not tenable, or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, *with a malicious intent to ruin a rival trader*, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action.<sup>2</sup> In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant; and it

<sup>1</sup> The rest of the opinion on this point is omitted. — Ed.

<sup>2</sup> See note (4) to *Skinner v. Gunton*, 1 Wms. Saund. 230.



would seem unjust, and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. *Cowling* on this part of the case seem well worthy of attention.

Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services *during the period for which she had so contracted*, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

ERLE, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person ~~hired should break his contract~~, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than of those hiring, are not numerous; but

still they seem to me sufficient to show that the principle has been recognized. In *Winsmore v. Greenbank* it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*<sup>1</sup> it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd v. Wakeman*<sup>2</sup> is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison*<sup>3</sup> and in *Taylor v. Neri*<sup>4</sup> it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird v. Randall*<sup>5</sup> is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my

<sup>1</sup> 2 C. M. & R. 707.

<sup>2</sup> 1 Sid. 79.

<sup>3</sup> 1 Peake's N. P. C. 194; s. c. 1 Esp. N. P. C. 48.

<sup>4</sup> 1 Esp. N. P. C. 386.

<sup>5</sup> 3 Burr. 1345.

judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

WIGHTMAN, J.<sup>1</sup> It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged; which ought not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged, that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule, and are not to be extended; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended, for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract, into which he has entered, and by which refusal the plaintiff has sustained an injury; and, though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such action was maintainable; and the authority of Lord Chief Baron Comyns was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the *injuria*, and the *damnum*; but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant. And the case of *Vicars v. Wilcocks*,<sup>2</sup> which though it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by Lord Chief Justice Tindal in *Ward v. Weeks*,<sup>3</sup> that the damage in that case, as well as in *Vicars v. Wilcocks*,<sup>2</sup> was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized com-

<sup>1</sup> Only a part of the opinion of WIGHTMAN, J., is given. — ED.

<sup>2</sup> 8 East, 1.

<sup>3</sup> 7 Bing. 211, 215.

munications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button*,<sup>1</sup> in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case, that, as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the court held the action to be maintainable, though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause, and the damage accruing thereby. In *Winsmore v. Greenbank* the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him, during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff, whereby he would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs, and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good, and that it sufficiently appeared that there was both *damnum* and *injuria*: it was *prima facie* an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act; and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favor in the present case. It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so; and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of the two cases referred to, of *Green v. Button*<sup>1</sup> and *Winsmore v. Greenbank*, as well as upon general principle, that an action on the case is maintainable. A doubt was expressed by Lord Eldon, in *Morris v. Langdale*,<sup>2</sup> whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage, that, by reason of the speaking of the words, other persons refused to perform their contracts with him; Lord Eldon observing that that was a damage which might be compensated in actions by the plaintiff against such persons. It has, however, been remarked with much force by Mr. Starkie, in his

<sup>1</sup> 2 C. M. & R. 707.<sup>2</sup> 2 Bos. & Pul. 284, 289.

Treatise on the Law of Libel, vol. i. p. 205 (2d edition), that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt indeed is hardly sustainable on principle; and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs; as in the case of *Newman v. Zachary*, where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. Upon the whole, therefore, I am of opinion that, upon the general principles upon which actions upon the case are founded, as well as upon authority, the present action is maintainable.

COLERIDGE, J. It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued;<sup>1</sup> that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Laborers, 23 Edw. III., and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to show, as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavor, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence: however complete the *injuria*, and whether with malice or without, if the act be after all *sine damno*, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of

<sup>1</sup> Only the opinion of COLERIDGE, J., on this point is given. It is now generally admitted that this learned judge, although *wrong* on this point, was right in maintaining that the actress was not a servant. — ED.

the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C. urgently and *bona fide* advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted; the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and let C. have persuaded, not *bona fide* but *mala fide* and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is *malitia sine damno*, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion: there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which Lord Kenyon proceeded in *Ashley v. Harrison*.<sup>1</sup> There the defendant libelled Madame Mara; the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill-treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord Kenyon nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a *procuring*. In *Winsmore v. Greenbank* the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice, who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may

<sup>1</sup> 1 Peake's N. P. C. 194; s. c. 1 Esp. N. P. C. 48.

no doubt sometimes be actionable — as in trespass — even where it is used towards a free agent; the maxims, *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of *Winsmore v. Greenbank* seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank*. A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited,<sup>1</sup> Judge Hankford<sup>2</sup> gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract; if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument *primæ impressionis* is sometimes of no weight. If the cir-

<sup>1</sup> Mich. 11 H. 4, fol. 23 A. pl. 46, 2 E. & B. 255.

<sup>2</sup> William Hankford, Justice of the Common Pleas in 1398, afterwards, in 1414 (1 H. 5), Chief Justice of England.

cumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried. Now we find a plentiful supply both of text and decision in the case of seduction of servants; and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of *Adams v. Bafeald*<sup>1</sup> and *Blake v. Lanyon* are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay; and this reason is given: "The very act of giving him employment is affording him the means of keeping out of his former service." Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Laborers, to which no reference was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the jurymen. Again, why draw the line between bad and good faith? If advice given *mala fide*, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them? According to all legal analogies the *bona fides* of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to

<sup>1</sup> 1 Leon. 240.



the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why do we stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract; why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my brother Alderson in the case of *Winterbottom v. Wright*; <sup>1</sup> if we go the first step, we can show no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence; they are not of slight importance, and could hardly have been decided without reference to the Courts in Banc. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.

*Judgment for plaintiff.*<sup>2</sup>

<sup>1</sup> 10 M. & W. 109.

<sup>2</sup> *Cattle v. Stockton Co.*, L. R. 10 Q. B. 453, 458 (*semble*) *Accord*.

The doctrine of *Lumley v. Gye* as to the malicious procurement of a breach of contract is generally recognized in this country. *Hewitt v. Ontario Co.*, 44 Up. Can. Q. B. 287; *Heaton Co. v. Dick*, 55 F. R. 23, 52 F. R. 667; *Chipley v. Atkinson*, 23 Fla. 206; *Heywood v. Tillson*, 75 Me. 225, 236 (*semble*); *Walker v. Cronin*, *infra*, 694; *Lally v. Cantwell*, 30 Mo. Ap. 524; (See also *McCann v. Wolff*, 28 Mo. Ap. 447); *Van Horn v. Van Horn*, 52 N. J. 284; *Haskins v. Royster*, 70 N. Ca. 601; *Jones v. Stanley*, 76 N. Ca. 355; *Delz v. Winfree*, 80 Tex. 400, 405; *Duffies v. Duffies*, 76 Wis. 374, 377 (*semble*) *Accord*. See also *Carroll v. Falkiner, Kerford & Box*, Dig. Victoria Cases, 216.

But see, *contra*, *Boyson v. Thorn* (Cal. 1893), 33 Pac. R. 492; *Barron v. Collins*, 49 Ga. 580 (*semble*); *Ashley v. Dixon*, 48 N. Y. 430; *Chambers v. Baldwin* (Ky. 1891), 15 S. W. R. 57; *Bonlier v. McCauley* (Ky. 1891), 15 S. W. R. 60.

In *Ensor v. Bolgiano*, 67 Md. 190, the question was left open. The majority of the court thought the question did not arise. Two judges thought otherwise, and favored the rule of *Lumley v. Gye*.

It was decided before the case of *Lumley v. Gye* that an action for slander of title was maintainable where the only special damage laid was the breach by a third person of his contract with the plaintiff. *Green v. Button*, 2 C. M. & R. 707. But see, *contra*, *Kendall v. Stone*, 5 N. Y. 14; *Brentman v. Note*, 3 N. Y. Sup. 420 (N. Y. City Court).

So an action would doubtless lie for defamatory words, not actionable *per se*, which induced a third person to break his contract to marry the plaintiff. — Ed.

## BOWEN v. HALL AND OTHERS.

IN THE COURT OF APPEAL, FEBRUARY 5, 1881.

*[Reported in 6 Queen's Bench Division, 333.]*

BRETT, L. J.<sup>1</sup> The Lord Chancellor agrees with me in the judgment I am about to read, and it is to be taken therefore as the judgment of the Lord Chancellor as well as of myself.

In this case, we were of opinion at the hearing, that the contract was one for personal service, though not one which established strictly for all purposes the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service, that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson, was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained nevertheless the question, whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of *Lumley v. Gye*. If that case was rightly decided, the objection in this case failed. The only question then which we took time to consider was whether the decision of the majority of the judges in that case should be supported in a Court of Error. That case was so elaborately discussed by the learned judges who took part in it, that little more can be said about it, than whether, after careful consideration, one agrees rather with the judgments of the majority, or with the most careful, learned, and able judgment of Mr. Justice Coleridge. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*.<sup>2</sup> If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on

<sup>1</sup> The statement of facts and the dissenting opinion of LORD COLERIDGE, C. J., are omitted. — ED.

<sup>2</sup> 1 Sm. L. C. (8th ed.) p. 264.

his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks*<sup>1</sup> requires this doctrine for its support, it is in our opinion wrong.

We are of opinion that the propositions deduced above from *Ashby v. White*<sup>2</sup> are correct. If they be applied to such a case as *Lumley v. Gye*, the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract, may not be wrongful in law or fact as in the second case put by Coleridge, J.<sup>3</sup> But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The technical objections alluded to above have been suggested as the consequences of the judgment in *Vicars v. Wilcocks*.<sup>1</sup> But that judgment when so used or relied on seems to us to be disapproved in the opinions given in the House of Lords in *Lynch v. Knight*,<sup>4</sup> and seems to us when so used to be unreasonable. In the case of *Lumley v. Gye*, and in the present case, the third condition is fulfilled, namely, that the act of the defendant caused an injury to the plaintiff, unless again it can be

<sup>1</sup> 8 East, 1.

<sup>3</sup> *Supra*, 609.

<sup>2</sup> 1 Sm. L. C. (8th ed.) p. 264.

<sup>4</sup> 9 H. L. C. 577.

said correctly that the injury is too remote from the cause. But that raises again the same question as has been just dismissed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. That is stated in all the opinions in *Lynch v. Knight*.<sup>1</sup> The injury is in such a case in law as well as in fact a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognized. It follows that in *Lumley v. Gye*, and in the present case, all the conditions necessary to maintain an action on the case are fulfilled.

Another chain of reasoning was relied on by the majority in *Lumley v. Gye*, and powerfully combated by Coleridge, J. It was said that the contract in question was within the principle of the Statute of Laborers, that is to say, that the same evil was produced by the same means, and that as the statute made such means when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employed with regard to parties standing in a similar relation as also wrongful. If, in order to support *Lumley v. Gye*, it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Coleridge, J., upon the second head of his judgment seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the support of the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine. And we are therefore of opinion that the judgment of the Queen's Bench Division was correct, and that the principal appeal must be dismissed.

*Appeal dismissed.*

<sup>1</sup> 9 H. L. C. 577.

SECTION I. (*continued*).

(d) THE DUTY OF AN INDIVIDUAL NOT TO COMMIT A TORT

NEWMAN v. ZACHARY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1671.

[*Reported in Aleyn, 3.*]

ACTION sur le case. The plaintiff declares that the defendant was his shepherd, and that two of his sheep did stray, one of which being found again, the defendant affirmed to be the plaintiff's, whereupon the plaintiff paid for the feeding of it, and caused it to be shorn and marked with his own mark; and yet afterwards the defendant *malitiose machinans* to disgrace the plaintiff, and knowing the said sheep to be the plaintiff's, *falso & fraudulententer affirmavit* to the bailiff of the manor that had waifs and strays belonging to it, that this sheep was an estray: whereupon the bailiff seized it to his damage, &c. And after a verdict for the plaintiff *Latch* moved that there was no cause of action, for there is no breach of trust in the defendant as shepherd, and his words cannot endamage the plaintiff, for he shall have his remedy against the bailiff of the manor that seized the sheep wrongfully. But it was adjudged that the action would lie, because the defendant by his false practice hath created a trouble, disgrace, and damage to the plaintiff; and though the plaintiff have cause of action against the bailiff, yet this will not take off his action against the defendant in respect of the trouble and charge that he must undergo in the recovery against the bailiff, and *HALES* said that if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him that caused the disturbance.

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SARAH M. RICE v. JOHN T. COOLIDGE AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, DECEMBER 1, 1876.

[*Reported in 121 Massachusetts Reports, 393.*]

MORTON, J. This is an action of tort. The principal question raised by the demurrer is, whether the plaintiff's declaration states any legal cause of action. Each count alleges, in substance, that a proceeding for a divorce was pending in the courts of the State of Iowa, between Joseph S. Coolidge and Mary L. Coolidge, in which the latter alleged that the said Joseph S. Coolidge had been guilty of adultery with the plaintiff; that the defendants conspired together and with the said Mary L. Coolidge to procure and suborn witnesses to falsely tes-

tify in support of said charges of adultery; and that the defendants, in pursuance and execution of said conspiracy, did procure and suborn certain witnesses named, to testify in said divorce suit, and to falsely swear to criminal sexual intercourse between the plaintiff and said Joseph S. Coolidge, and between the plaintiff and other persons, and to various other acts and things which, if believed, would tend to bring disgrace and infamy upon the plaintiff.

Three of the counts also allege that the defendants, in pursuance and execution of the conspiracy, published or caused to be published a printed pamphlet in which the false testimony of such witnesses was repeated, and made the pretext for false and malicious charges upon the plaintiff's character and good name.

The gist of the plaintiff's case is that the defendants have suborned witnesses to falsely swear to defamatory statements concerning her, and have done other connected acts in pursuance of a scheme or plan to defame her. The alleged conspiracy or combination is not one of the elements of the cause of action. That is not created by the conspiracy, but by the wrongful acts done by the defendants to the injury of the plaintiff. If the acts charged, when done by one alone, are not actionable, they are not made actionable by being done by several in pursuance of a conspiracy. *Wellington v. Small*,<sup>1</sup> *Parker v. Huntington*,<sup>2</sup> *Bowen v. Matheson*.<sup>3</sup>

The question is presented, therefore, whether the plaintiff can maintain an action of tort, in the nature of the common-law action on the case, against the defendants for suborning witnesses to falsely swear to defamatory statements concerning the plaintiff in a suit in which neither of the parties to this suit was a party.

It requires no argument to show that the acts charged as done by the defendants, if proved, are a great wrong upon the plaintiff. It is a general rule of the common law that a man shall have a remedy for every injury. The plaintiff should have a remedy for the injury done to her by the defendants, unless there are some other rules of law, or some controlling considerations of public policy, which take the case out of this rule.

The defendants contend that the witnesses who uttered the defamatory statements are protected from an action, because they were statements made in the course of judicial proceedings, and that therefore a person, who procured and suborned them to make the statements, is not liable to an action.

It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*,<sup>4</sup> *Revis v. Smith*,<sup>5</sup> *Dawkins v.*

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<sup>1</sup> 3 Cush. 145.

<sup>2</sup> 2 Gray, 124.

<sup>3</sup> 14 Allen, 499.

<sup>4</sup> 4 H. & N. 569.

<sup>5</sup> 18 C. B. 126.

Rokeby,<sup>1</sup> *Seaman v. Netherclift*. The same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, *Smith v. Howard*,<sup>2</sup> *Barnes v. McCrate*,<sup>3</sup> *Kidder v. Parkhurst*,<sup>4</sup> *Hoar v. Wood*.<sup>5</sup> In the last-cited case, Chief Justice Shaw says: "We take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry."

We assume, therefore, for the purposes of this case, that the plaintiff cannot maintain an action against the witnesses in the suit in Iowa, for their defamatory statements, though they were false. But it does not follow that she may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely.

The reasons why the testimony of witnesses is privileged are that it is given upon compulsion and not voluntarily, and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony.<sup>6</sup> But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.

The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tort-feasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tort-feasor from such suit. A similar argument was disregarded by the court in *Emery v. Hapgood*,<sup>7</sup> where it was held that the defendant, who instigated and procured an officer to arrest the plaintiff upon a void warrant, was liable to an action of tort therefor, although the officer who served the warrant was protected from an action, for reasons of public policy.

<sup>1</sup> L. R. 8 Q. B. 255, and cases cited; affirmed, L. R. 7 H. L. 744.

<sup>2</sup> 28 Iowa, 51.

<sup>3</sup> 32 Maine, 442.

<sup>4</sup> 3 Allen, 393.

<sup>5</sup> 3 Met. 193.

<sup>6</sup> It is well settled that no action is allowed against a witness for damage caused by his perjury. *Davenport v. Sympton*, Cro. El. 520, Ow. 158, 2 And. 47, s. c.; *Eyres v. Sedgwick*, Cro. Jac. 601, Yelv. 142, 2 Roll. R. 197, s. c.; *Wimberly v. Thompson*, Noy, 6; *Harding v. Bodman*, Hutt. 11; *Coxe v. Smith*, 1 Lev. 119; *Taylor v. Bidwell*, 65 Cal. 489; *Bostwick v. Lewis*, 2 Day, 447; *Grove v. Brandenburg*, 7 Blackf. 239; *Dunlap v. Glidden*, 31 Me. 435; *Severance v. Judkins*, 73 Me. 376, 379; *Garing v. Frasier*, 76 Me. 37; *Phelps v. Stearns*, 4 Gray, 105; *Curtis v. Fairbanks*, 16 N. H. 542; *Smith v. Lewis*, 3 Johns. 157; *Jones v. McCaddin*, 34 Hun, 632; *Cunningham v. Brown*, 18 Vt. 123.

See *Bell v. Senneff*, 83 Ill. 122. — Ed.

<sup>7</sup> 7 Gray, 55.

The defendants rely upon the cases of *Bostwick v. Lewis*<sup>1</sup> and *Smith v. Lewis*.<sup>2</sup> But those cases turn upon a principle which does not apply in the case at bar. The facts in those cases were as follows: Lewis brought an action in Connecticut against several defendants, in which he prevailed. Afterwards Bostwick, one of the defendants in the original action, brought an action in Connecticut against Lewis, for suborning a witness in that action; and Smith, another of the defendants, brought a similar action in New York. It was held in each case that the action could not be maintained, because, in the language of Mr. Justice Kent, it was "an attempt to overhaul the merits" of a former suit. The case of *Dunlap v. Glidden*<sup>3</sup> is to the same effect. Although the parties to a former action cannot retry its merits, while a judgment therein is in force and unreversed, yet any person who was not a party to the action, or in privity with a party, may in a collateral action impeach the judgment and overhaul the merits of the former action. Those cases, therefore, are not decisive of the case at bar.<sup>4</sup>

The defendants argue that an action of this nature ought not to be maintained, because the plaintiff therein might, by the testimony of a single witness, prove that a witness in another action had committed perjury. The rule of law, that a man cannot be convicted of perjury upon the unaided testimony of one witness, is a rule applicable only to criminal proceedings. The argument may go to show that the rule ought to be extended to civil cases in which perjury is charged against a witness, but it does not furnish a satisfactory reason why a plaintiff should be altogether deprived of a remedy for an injury inflicted upon him.

It is also urged, as an argument against the maintenance of this action, that it is a novelty. The fact that an action is without a precedent would call upon the court to consider with care the question whether it is justified by correct principles of law; but if this is found, it is without weight. In answer to the same argument, Lord Chief Justice Willes said: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*.

Upon a careful consideration of the case, we are of opinion that there are no rules of law and no reasons of public policy which deprive the plaintiff of her remedy for the wrong done her by the defendants by suborning witnesses to defame her character.<sup>5</sup>

*Demurrer overruled.*

<sup>1</sup> 2 Day, 447.

<sup>2</sup> 3 Johns. 157.

<sup>3</sup> 31 Maine, 435.

<sup>4</sup> See also *Taylor v. Bidwell*, 65 Cal. 489; *Curtis v. Fairbanks*, 16 N. H. 542; *Stevens v. Rowe*, 59 N. H. 578. — Ed.

<sup>5</sup> A part of the opinion relating to points of pleading is omitted. — Ed.



## SMITH v. TONSTALL.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[Reported in *Carthew*, 3.]

IN a special action on the case, the plaintiff declared as administrator *durante minore ætate* of R. S., executor of the last will and testament of R. S., his father, setting forth that the testator, R. S., in his life-time had obtained a judgment for £100 against W. S., who was likewise indebted to the testator in another, £100 for rent; and that after the death of the said testator, the plaintiff had judgment on a *scire facias* to have execution, &c., and that he intending to take out execution, and also to bring an action of debt for the rent in arrear (the said W. S. being then possessed of goods and chattels sufficient to discharge the whole), which being very well known to the defendant, he of his malice and covin with the said W. S. did conspire to defeat the plaintiff of his execution, and of recovering the money for rent arrear, procured the said W. S. to confess a judgment for £160 (of such a Term) to one W. N., *ubi revera*; the said W. S. did not owe anything to the said W. N., and that he sued out execution upon this *feigned judgment*, by virtue whereof he seised all the goods and chattels of the said W. S., which he esloined to places unknown, and converted to his own use, by reason whereof the plaintiff lost his debt.

The defendant demurred to this declaration for matter in law, supposing that this action would not lie; but it was adjudged that the action would lie, and thereupon the defendant Tonstall brought a writ of error in parliament, where the judgment was affirmed.<sup>1</sup>

## E. J. KLOUS v. E. HENNESSEY AND OTHERS.

IN THE SUPREME COURT, RHODE ISLAND, JUNE 14, 1881.

[Reported in 13 *Rhode Island Reports*, 332.]

“ DUFFEE, C. J.<sup>2</sup> This is an action on the case for conspiracy. The declaration charges in effect that the defendants and one Patrick Kenney, said Kenney being then a debtor of the plaintiffs, conspired together to prevent the plaintiffs and the other creditors of said Kenney from getting payment of their claims out of his property, and that, in pursuance of the conspiracy, Kenney made fictitious mortgages of his real and personal property to the defendants, under cover of which the defendants removed the personal property out of the possession of

<sup>1</sup> Findlay v. McAllister, 113 U. S. 104 (*semble*); Adams v. Page, 7 Pick. 541 *Accord.* — ED.

<sup>2</sup> Only the opinion of the court is given. — ED.

Kenney, and secreted it so that the plaintiffs were prevented from attaching it, and thus lost their claims. At the trial, after the plaintiffs had introduced their testimony in proof of the declaration, the court, on motion of the defendants, it having appeared that the plaintiffs were merely creditors at large of Kenney, without any interest in his property or lien upon it by attachment, levy, or otherwise, ruled that the action, in respect of the charges aforesaid, was not maintainable. The plaintiffs excepted to the ruling for error, and now petition for a new trial.

There is some conflict of authority on the question thus raised, but the more numerous and, we think, the better-reasoned and stronger cases are against the action. The principal ground of decision in these cases is that the damage, which is the gist of the action, is too remote, uncertain, and contingent, inasmuch as the creditor has, not an assured right, but simply a *chance* of securing his claim by attachment or levy, which he may or may not succeed in improving. It is impossible to find any measure of damages for the loss of such a mere chance or possibility. Another ground, added in some of the cases, is that no action would lie in favor of such a creditor against the debtor for putting his property beyond the reach of legal process, if the debtor were to do it by himself alone, and that what would not be actionable if done by himself alone cannot be actionable any the more when done by him with the assistance of others. The first of these grounds, which is the fundamental one and has been chiefly relied on, has been so exhaustively analyzed and discussed in the cases that it is impossible for us to add anything to the reasons adduced in support of it; and therefore, without reproducing them, we deem it sufficient simply to cite the cases themselves, all of which are accessible and can be readily consulted. *Lamb v. Stone*; <sup>1</sup> *Wellington v. Small*; <sup>2</sup> *Moody v. Burton*; <sup>3</sup> *Adler v. Fenton*; <sup>4</sup> *Austin v. Barrows*; <sup>5</sup> *Kimball v. Harman & Burch*; <sup>6</sup> *Bradley v. Fuller*.<sup>7</sup> See also *Bump on Fraudulent Conveyances*, 505, 506; *Cooley on Torts*, 124, 586. *Petition dismissed*.<sup>8</sup>

<sup>1</sup> 11 Pick. 527.<sup>2</sup> 3 Cush. 145.<sup>3</sup> 27 Me. 427, 431.<sup>4</sup> 24 How. U. S. 407.<sup>5</sup> 41 Conn. 287, 296.<sup>6</sup> 34 Md. 407, 410.<sup>7</sup> 118 Mass. 239.<sup>8</sup> *Adler v. Fenton*, 24 How. 407; *Findlay v. McAllister*, 113 U. S. 104 (*semble*); *Austin v. Barrows*, 41 Conn. 287; *Green v. Kimble*, 6 Blackf. 552; *Moody v. Burton*, 27 Me. 427; *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 146; *LeGierse v. Kellum*, 66 Tex. 242 *Accord*.*Penrod v. Mitchell*, 8 S. & R.; *Penrod v. Morrison*, 2 Pa. 126; *Mott v. Danforth*, 6 Watts, 305; *Hopkins v. Beebe*, 26 Pa. 85, 87; *Kelsey v. Murphy*, 26 Pa. 78, 84; *Collins v. Cronin*, 117 Pa. 35, 45 *Contra*. — Ed.

## H. WHITMAN, TRUSTEE, v. G. L. SPENCER AND J. WILBOUR.

IN THE SUPREME COURT, RHODE ISLAND, MARCH, 1852.

[Reported in 2 Rhode Island Reports, 124.]

GREENE, C. J.,<sup>1</sup> charged the jury. The plaintiff charges the defendants with conspiring for the purpose of depriving him of his remedy on the property of Wilbour for the recovery of his debt. The declaration sets forth that Wilbour, being indebted to the plaintiff in the sum of \$6,000, executed to Spencer an absolute bill of sale of his stock of goods, with the understanding that the goods were to be removed from New York, where they were liable to attachment, into Rhode Island, and that the plaintiff was thereby defrauded of his remedy against them. It is generally true in law that for every injury there is a remedy, but the party must prove his injury in order to entitle him to the remedy. The charge is a charge of fraud, and must be clearly made out. In this case it is not denied that Wilbour owed the plaintiff the sum of \$6,000, that the debt was incurred on goods sold to stock the defendant, Wilbour's, store in New York; nor is it denied that on the 29th of December, 1851, Wilbour had on hand a stock worth about \$6,000, and that at that time he made to Spencer a clear bill of sale of the same without any consideration; and that the goods were brought to Providence and there stored and afterwards sold by Spencer. Spencer's account of this transaction is that the goods were brought to Providence to be sold for the benefit of Wilbour's creditors, under such preferences as he chose to make; he attempting to do in this informal way what ought to have been done in a more regular way by an assignment, and that there was no intent to convert them to the use of the defendants or to defraud the creditors of Wilbour. Now you will look into all the circumstances, whether admitted or disputed, and if upon a fair consideration you shall think the goods were honestly taken with a *bona fide* intent to pay the debts of the creditors, and not to defraud the plaintiff or to compel him to a compromise, then you need go no further, for though the bill of sale constituted no legal transfer of the property as to creditors, but still left it open to attachment, yet if their motive was honest the defendants cannot be liable upon a charge of fraudulent conspiracy. But if their motive was to secrete the property or to compel Handy to a compromise upon their own terms without making an exhibit of the affairs of Wilbour, then they are legally guilty of a conspiracy. The question turns entirely upon their motive in the transaction, and lies wholly within the province of the jury.

If the defendants were actuated by a dishonest motive, it will then remain for you to award the plaintiff damages. Whatever damages he

<sup>1</sup> Only the opinion of the court is given. — Ed.

has sustained you will award to him ; if he was the sole creditor he is entitled to full payment, if the proceeds of the sale of the goods were sufficient for that purpose ; if there were other creditors, with equal or greater claims on the property, this will be a matter for you to consider in determining the damages to be given.

The jury were unable to agree.<sup>1</sup>

<sup>1</sup> *Page v. Parker*, 43 N. H. 363; *Moore v. Tracy*, 7 Wend. 229; *Place v. Minster*, 65 N. Y. 89 *Accord.* — ED.

## SECTION II.

*By Influencing a Third Person who owes No Legal Duty to the Plaintiff.*

(a) BY SLANDER OF TITLE AND DISPARAGEMENT OF GOODS.

## PENNYMAN v. RABANKS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[Reported in Croke, Elizabeth, 427.]

ACTION upon the case for slandering his title. For that he said to J. S., who was in speech to buy the plaintiff's land, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," *ubi revera nulla talis dimissio facta fuit*. The defendant justifies by reason of two several leases by *parol* made unto himself. The plaintiff replies *de injuria sua propria absque tali causa*. Issue was joined, and found for the plaintiff. It was now moved in arrest of judgment that an action lay not for these words; because it appears by the defendant's justification that he intended of leases made of himself; and if a man claim estates, although they be false he shall not be punished. This was agreed by all the court, that no action lay against one for saying that he himself had title or estate in lands, &c., although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title. Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shown upon the third day of the next term. Afterwards, Pasch. 38 Eliz., it was adjudged for the plaintiff, FENNER *contradicente*.<sup>1</sup>

<sup>1</sup> Mildmay's Case, 1 Rep. 177 b; Marvin v. Maynard, Cro. El. 419; Newman v. Zachary, Al. 3; Rowe v. Roach, 1 M. & S. 304; Bignell v. Buzzard, 3 H. & N. 217; Webb v. Cecil, 9 B. Mon. 198; Ross v. Pynes, Wythe, 71, 3 Call, 490 Accord. — ED.

In Rowe v. Roach, *supra*, Lord Ellenborough said, p. 310: "The law makes no allowance for the slander of strangers, whatever it may do in behalf of those who have a real title, or a claim of title. *Rei immiscet se alienæ* is the good sense which must govern this case. Here the defendant is a stranger himself, and shows no authority from those who are parties in interest." — ED.

HATCHARD v. MÈGE AND OTHERS.

IN THE QUEEN'S BENCH DIVISION, APRIL 1, 1887.

[*Reported in 18 Queen's Bench Division Reports, 771.*]

DAY, J.<sup>1</sup> This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say : —

"'Caution : Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word ' Delmonico ' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom."

The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether

<sup>1</sup> Only the opinion of DAY, J., is given. WILLS, J., concurred. — ED.

a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in *Odgers on Libel and Slander*, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name — slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim. *Order for a new trial.*

## MALACHY v. SOPER AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 25, 1836.

[Reported in 3 Bingham, New Cases, 371.]

TINDAL, C. J.<sup>1</sup> In this case a verdict having been found for the plaintiff at the trial of the cause with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action. And we are of opinion that this objection is well founded; and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander either oral or written; in which form of action no special damage need either be alleged or proved; the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the "petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as share-owners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings." The publication therefore is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication, and that this declaration shows none.

The first question therefore is, does the law require in such an action an allegation of special damage? And looking at the authorities we think they all point the same way. The law is clearly laid down in Sir W. Jones, 196 (*Lowe v. Harewood*): "of slander of title, the plaintiff shall not maintain action, unless it was *revera* a damage; *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., Sir John Tasborough *v.* Day,<sup>2</sup> and Manning *v.* Avery,<sup>3</sup> the case of *Cane v. Goulding*<sup>4</sup> furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "his right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiose*, and that he was likely to sell, and was injured by the words; and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, "there ought to be a scandal and a particular damage set forth, and there is not here;" and upon its being moved again

<sup>1</sup> Only the opinion of the court is given. — Ed.<sup>2</sup> Cro. Jac. 484.<sup>3</sup> Keb. 153.<sup>4</sup> Style's Rep. 169, 176.



and argued by the judges, Rolle, C. J., held that the action did not lie, although it was alleged that the words were spoken *falso et malitiose*, for "the plaintiff ought to have a special cause; but that, the verdict might supply; but the plaintiff ought also to have showed a special damage which he hath not done, and this the verdict cannot supply: the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, has there been such a special damage alleged in this case, as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (R. 1 Roll. 244). Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action, that it is not so much an action for slander of title as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plain-

tiff's title to his shares, and nothing else. The bill in Chancery, out of which the publication arose, is filed by Tollervy, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines, was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print; but that it rests on the nature of the action itself, namely, that it is an action for special damage actually sustained, and not an action for slander.—The circumstance of the slander of title being conveyed in a letter or other publication appears to us to make no other difference than that it is more widely and permanently disseminated, and the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion, that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the *innuendo* laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment, *Absolute*.<sup>1</sup>

<sup>1</sup>Tasburgh v. Day, Cro. Jac. 484; Gresham v. Grinsley, Yelv. 88; Sneede v. Badley, 3 Bulst. 74, 1 Roll. 244, s. c.; Law v. Harwood, Cro. Car. 140, W. Jones, 196; Cane v. Golding, Sty. 169, 176; Manning v. Avery, 3 Keb. 153; Haddan v. Lott, 15 C. B. 411; Evans v. Harlow, 5 Q. B. 624; Ashford v. Choate, 20 Up. Can. C. P. 471; Collins v. Whitehead, 34 F. R. 121; Stark v. Chitwood, 5 Kans. 141; Swan v. Tappan, 5 Cush. 104; Gott v. Pulsifer, 122 Mass. 235; Dooling v. Budget Co., 144 Mass. 258; Boynton v. Shaw Co., 146 Mass. 219; Wilson v. Dubois, 35 Minn. 471; Tobias v. Harland, 4 Wend. 537; Madison Church v. Madison Church, 26 How. Pr. 72; Linden v. Graham, 1 Duer, 670; Bailey v. Dean, 5 Barb. 297; Kendall v. Stone, 5 N. Y. 14; Kennedy v. Press Co., 41 Hun, 422; Childs v. Tuttle, 48 Hun, 228 Accord. ✓

The breach of a contract by a third person is special damage. Green v. Button, 2 C. M. & R. 707. But see *contra*, Kendall v. Stone, 5 N. Y. 14; Brentman v. Note, 3 N. Y. Sup. 420 (N. Y. City Court). — Ed.

## PITT v. DONOVAN.

IN THE KING'S BENCH, JUNE 29, 1813.

[Reported in 1 Maule &amp; Selwyn, 639.]

ACTION for slander of title. Plea: general issue.

At the trial before Graham, B., it appeared that the plaintiff had purchased certain lands at Bromesberrow from W. H. Y., and was about to sell the same to one Barton, but that the defendant wrote two letters to Barton warning him against completing the purchase, on the ground that W. H. Y. was insane at the time of his conveyance to the plaintiff. Barton thereupon declined to purchase the lands. It further appeared that a term of years in the estate was vested in the defendant as trustee for securing to Mrs. W. H. Y. her jointure, and that the defendant's wife was sister of W. H. Y., and his heir in the event of his dying without issue.

After an investigation of many hours the learned judge left the question to the jury upon the evidence, stating to them, in the course of his summing up, that in order to maintain the action some malice must be fixed on the defendant, that is, the action must be injurious and proceeding from an improper motive; that if the evidence satisfied them, as men of good sense and good understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict.

The jury found a verdict for the plaintiff, damages 40s.; whereupon a rule *nisi* was obtained in the last term for a new trial, on the ground of a misdirection.

*Dauncey, Abbott, and Puller*, now showed cause.<sup>1</sup>

*The Attorney-General, Jervis, and W. E. Taunton, contra*, were stopped by the court.

BAYLEY, J.<sup>2</sup> I am of the same opinion. It seems to me that the question for the consideration of the jury was, whether the defendant really believed that which he made the subject of his communication. I have no difficulty in saying that the defendant is not to be regarded as a mere stranger in this case. I think that he had not only a right, but, if he believed it to be true, that he was called upon to make the communication; for if at any subsequent time Mr. Y. should die without issue, and afterwards the defendant should bring an ejectment to try the sanity of this gentleman, it would afford matter for strong observation against him, that he had suffered Burton to complete the

<sup>1</sup> The statement of the case has been condensed; the argument for the plaintiff, and the concurring opinions of LORD ELLENBOROUGH, C. J., and DAMPIER, J., are omitted. — ED.

<sup>2</sup> LE BLANC, J., had left the court.

purchase of this estate and to pay his money for it, without communicating to him that his title would be disputed. I think, therefore, that if the defendant really believed this contract to be void for the want of sanity in Y, it was not only his right but his duty to make the communication. Then where a person who is not to be treated as a mere stranger is sued in an action of this kind, two things are to be made out; first, that there is a want of probable cause; and secondly, that the party who made the communication acted maliciously. Now whether a party acted maliciously depends upon his own motives and on the view which the jury entertained of the mind of the party himself; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of some one other person; therefore if we refer to a mind that is sensible and reasonable, and which does not judge under the same pressure as the mind of the person in question might do, and make that sensible and reasonable mind the standard by which to judge of the state of mind of the person who is under that pressure, we shall be referring to an improper rule to judge by. The question here is not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated. I forbear to give any opinion on the weight of evidence, but the short question is, whether the defendant acted *bona fide*. That was the question for the jury to decide, but was not left to them in that form; that is, whether he acted maliciously or not. I therefore feel myself bound to say that there ought to be a new trial.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> Gerard v. Dickenson, 4 Rep. 18 a, Cro. El. 196, s. c.; Lovett v. Weller, 1 Rolle R. 409; Anon., Sty. 414; Smith v. Spooner, 3 Taunt. 246; Green v. Button, 2 C. M. & R. 707; Pater v. Baker, 3 C. B. 831; Watson v. Reynolds, M. & M. 1; Carr v. Duckett, 5 H. & N. 783; Atkins v. Perrin, 3 F. & F. 179; Brook v. Rawl, 4 Ex. 521; Burnett v. Tak, 45 L. T. Rep. 743; Steward v. Young, L. R. 5 C. P. 122; Wren v. Weild, L. R. 4 Q. B. 730; Hart v. Wall, 2 C. P. D. 146 (*semble*); Baker v. Piper, 2 T. L. R. 733; Dicks v. Brooks, 15 Ch. D. 22; Halsey v. Brotherhood, 19 Ch. Div. 386; Boulton v. Shields, 3 Up. Can. Q. B. 21; Hill v. Ward, 13 Ala. 310; McDaniel v. Baca, 2 Cal. 326; Thompson v. White, 70 Cal. 135; Reid v. McLendon, 44 Ga. 156; Van Tuyl v. Riner, 3 Ill. Ap. 556; Stark v. Chitwood, 5 Kans. 141; Gent v. Lynch, 23 Md. 58; Swan v. Tappan, 5 Cush. 104; Weekley v. Bostwick, 49 Mich. 374; Chesebro v. Powers, 78 Mich. 472; Meyrose v. Adams, 12 Mo. Ap. 329; Andrew v. Deshler, 45 N. J. 167; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 4 Keyes, 397, 3 Abb. Ap. 62, 41 Barb. 186; Hovey v. Rubber Co., 57 N. Y. 119; Dodge v. Colby, 37 Hun, 515, 108 N. Y. 445; Lovell Co. v. Houghton, 116 N. Y. 520; Hastings v. Giles Co., 51 Hun, 364, 121 N. Y. 674; Cornwell v. Parke, 52 Hun, 596, 123 N. Y. 657; McElwee v. Blackwell, 94 N. Ca. 261; Harriss v. Sneedeen, 101 N. Ca. 273 *Accord.* — Ed.

THE WESTERN COUNTIES MANURE CO. v. THE LAWES  
CHEMICAL MANURE CO.

IN THE EXCHEQUER, JUNE 9, 1874.

[*Reported in Law Reports, 9 Exchequer, 218.*]

BRAMWELL, B.<sup>1</sup> In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this, — that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary — which I do not think is the case — the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their

<sup>1</sup> Only the opinions of the court are given. — ED.

comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young v. Macrae*.<sup>1</sup> When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "*ubi jus ibi remedium*." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C. J., in his judgment in *Malachy v. Soper*. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shown. (Com. Dig. tit. Action on Case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy v. Soper*, *Evans v. Harlow*,<sup>2</sup> and *Young v. Macrae*,<sup>3</sup> I would only observe that, in the two first-mentioned cases,

<sup>1</sup> 3 B. & S. 264.

<sup>2</sup> 5 Q. B. 624.

<sup>3</sup> 3 B. & S. 264.

there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment<sup>1</sup> supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

*Judgment for the plaintiffs.*<sup>2</sup>

## JOHNSON v. HITCHCOCK.

SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1818.

[Reported in 15 Johnson, 185.]

IN error, on *certiorari* to a justice's court.

This was an action on the case brought by the defendant in error against the plaintiff in error, for a disturbance of his right of ferry, and his use and enjoyment thereof, and hindering persons from crossing at the same. It appeared that the defendant below had endeavored to divert travellers from the ferry of the plaintiff, representing it not to be as good as another near it, and had, on many occasions, succeeded. No evidence was offered on the part of the defendant, and the jury found a verdict for the plaintiff below, for twenty-two dollars and sixteen cents, on which judgment was rendered.

*Per Curiam.* It is clear, from the evidence, that the defendant below has, on many occasions, interfered, and prevented persons from crossing at the plaintiff's ferry; and if there is a good cause of action, the testimony shows an injury, probably, to the amount of the recovery. But there is no principle on which this action can be sustained. The evidence, imperfectly as it is stated, is sufficient to warrant the conclusion, that these are rival ferries near each other, and that the defendant below was unfriendly to the plaintiff's ferry, and endeavored to turn the custom to the other. This action does not appear to be founded on any slander of title, even admitting that an action of that kind might be sustained in a justice's court. Both ferries, from anything that appears to the contrary, have equal rights, and equal claims to be upheld and supported, and it cannot furnish a cause of action that travellers have been persuaded to cross the one rather than the other. If an action would lie in this case, it would in all cases of rival business, where any means are used to draw custom; and if this were once admitted, it would be difficult to know where to stop. The judgment must be reversed.

*Judgment reversed.*<sup>3</sup>

<sup>1</sup> 3 B. & S. at p. 271.

<sup>2</sup> Young v. Macrae, 3 B. & S. 264; Dooling v. Budget Co., 144 Mass. 258 (*semble*); Boynton v. Shaw Co., 146 Mass. 219; Wilson v. Dubois, 35 Minn. 471; Wier v. Allen, 51 N. H. 177; Snow v. Judson, 38 Barb. 210; Kennedy v. Press Co., 41 Hun, 422 (*semble*); Paull v. Halferty, 63 Pa. 46 *Accord.* — Ed.

<sup>3</sup> Young v. Macrae, 3 B. & S. 264 *Accord.* — Ed.

SECTION II. (*continued*).

(b) BY FRAUD.

BLOFELD v. PAYNE AND ANOTHER.

IN THE KING'S BENCH, JANUARY 12, 1833.

*[Reported in 4 Barnewall & Adolphus, 410.]*

CASE. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman, C. J., at the sittings in London after last term, it appeared that the defendants had obtained some of the plaintiff's wrappers, and used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' hones were of inferior quality? but he stated to them that even if the defendants' hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' hones were not inferior to his. Leave was reserved to move to enter a nonsuit.

*Barstow* now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' hones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITLEDALE, J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule.



TAUNTON, J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made this use of them, entitles the plaintiff to some damages.

PATTESON, J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN, C. J., concurred.

*Rule refused.*<sup>1</sup>

# STONE AND OTHERS v. CARLAN AND OTHERS.

IN THE NEW YORK SUPERIOR COURT, 1850.

[*Reported in 13 Law Reporter, 360.*]

THE important facts of this case appear in the opinion of the court. *J. Graham*, for defendants.

*H. A. Mott* and *J. F. Brady*, for plaintiff.

CAMPBELL, J. A motion is made for an injunction restraining the defendants from using the names "Irving Hotel," "Irving House," "Irving," &c., upon their coaches and upon certain badges worn by defendants upon their arms and hats. The complainants have an agreement with the proprietors of the Irving House, in this city, under which they are permitted to use the name of such proprietors, and the name of their hotel, upon their coaches and the badges of their servants; the complainants paying therefor a stipulated sum, and having also entered into bonds for the faithful discharge of these duties. All the porters are engaged in carrying passengers and their baggage to and from the hotels, boats, railroad depots, &c.

It was well remarked by the Master of the Rolls, in *Croft v. Day*,<sup>2</sup> that "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud; and fraud may be practised against him by means of a name, though the person

<sup>1</sup> *Singleton v. Bolton*, 3 Doug. 293 (*semble*); *Sykes v. Sykes*, 3 B. & C. 541; *Morison v. Salmon*, 2 M. & G. 385; *Crawshay v. Thompson*, 4 M. & G. 357 (*semble*); *Rodgers v. Nowill*, 5 C. B. 109 *Accord*. Compare *Glendon Co. v. Uhler*, 75 Pa. 467. — Ed.

<sup>2</sup> 7 Bevan, 84.

practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." I entirely concur in the foregoing views. The question is, whether the defendants have committed a fraud. I cannot doubt that their intention was to mislead, and to induce travellers to believe that they were servants of the proprietors of the Irving House. This is a large and popular hotel, well known in the country, and many a traveller may wish to resort to it on his arrival in this city, who, at the same time, may not know whether the carriages of the proprietors are painted red or white, or whether the exact designation is that of the Irving House or Irving Hotel. Such traveller may wish to intrust himself and his baggage to the servants of the hotel, feeling that, in doing so, he would be protected against loss or damage by the responsibility of the proprietors. Now, in this case, it can hardly be doubted but that the object of the defendant was to induce the belief on the part of the travellers that they were the servants of this hotel. To induce such belief, it was not necessary that the resemblance of all carriages and badges should be complete. From the very circumstances of the case, it would not be necessary to have a perfect resemblance, in order to commit even a gross fraud. It is not necessary to go, in this case, the length of the ordinary cases of trade-marks, though this case might come within the rules of those cases. (See *Coates v. Holluck*.<sup>1</sup>) The false pretences of the defendants would, I think, necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic, and attentive. The employment is open to them, but "they must not dress themselves in colors, and adopt and bear symbols," which belong to others. I had some doubt, at the time of the argument, whether the complaint should not have been made by the proprietors of the Irving House; but, on further reflection, think that the suit is well brought. The plaintiffs are the real parties in interest. It is possible that, owing to the general liability of the proprietors, as innkeepers, for the loss of the property of guests, the proprietors might also be entitled to an injunction restraining the defendants from holding themselves out as the servants of the hotel.

An injunction must issue, as prayed for, against all the defendants.<sup>2</sup>

<sup>1</sup> 2 Sanford Ch. R., and Notes, and cases there cited.

<sup>2</sup> In *Marsh v. Billings*, 7 Cush. 322, under similar circumstances, the plaintiff recovered damages in an action at law.

See also articles in 4 Harv. L. Rev. 321; 5 Harv. L. Rev. 139. — Ed.

## RIDING v. SMITH.

IN THE EXCHEQUER DIVISION, JANUARY 11, 1876.

[Reported in *Law Reports*, 1 *Exchequer Division*, 91.]

THE third<sup>1</sup> count was by the now plaintiff in his own right, and charged that he carried on business as a grocer and draper, and was assisted in the conduct of the same by his wife Margaret, and thereupon the defendant falsely and maliciously spoke and published of the said Margaret the words in the first count mentioned, whereby the plaintiff was injured in his business as a grocer and draper, and the persons named and many others ceased to deal with him.

The defendant pleaded not guilty and a justification.

At the trial it was proved that the words complained of were uttered in the presence of three or more persons. The person to whom they were addressed was on her way to the church of the district, where Joseph Abbott, who had been appointed to the incumbency, was about to read himself in. No evidence was given that any of the persons who heard the statement of the defendant had ceased to deal with the plaintiff, nor was there any evidence that particular persons had ceased to deal with the plaintiff, but there was evidence of a falling off in the profits of the business since the publication of the words complained of, and the plaintiff was unable to account for this falling off except as the consequence of the statements.

A verdict was found for the plaintiff for forty shillings, but leave was reserved to the defendant to move to enter a verdict for him or a nonsuit.

A rule *nisi* was accordingly obtained.

*Ambrose*, Q. C. (*H. W. Worsley* with him), showed cause.

*Pope*, Q. C., and *Crompton*, in support of the rule.

KELLY, C. B. I am of opinion that this rule should be discharged. At the trial, as the declaration originally stood, it was necessary to show that the slander was actionable either in itself, or else by reason of some special damage arising from it. But in the course of the case it was agreed that the wife of the plaintiff should be dismissed from the action, which then remained in substance not slander, but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff. The action is this, that the defendant stated in the hearing of divers persons that the wife of the plaintiff, who assisted him in carrying on his business, had been guilty of adultery, so that customers ceased to deal at the shop. The two questions are, first, whether such an action is maintainable at all; and, secondly, whether it can be maintained without proof of something of the same kind as the special damage

<sup>1</sup> Only the report upon this count is given; the argument for the defendant and the concurring opinions of POLLOCK and HUDDLESTON, BB., are omitted. — ED.

that would have to be proved in an action for slander. It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander, or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is, whether such a statement would be actionable without proof of special damage. That was requisite in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present. The cases show that in an action in respect of a statement made as to the wife or assistant of the plaintiff, the words would not be actionable as slander without proof of special damage, which must be established not merely by general evidence that the business has fallen off, but by showing that particular persons have ceased to deal with the plaintiff. I hope the day will come when the principle of *Ward v. Weeks*<sup>1</sup> and that class of cases shall be brought under the consideration of the court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part.

*Evans v. Harries*<sup>2</sup> is an authority that, in an action for slander for words spoken of the plaintiff in his trade or business, it is competent for him to prove a general loss of custom, although the declaration has alleged the loss of particular customers as special damage. So, here, I think it is sufficient to show that from the time of the injury being done the business has fallen off, and that it is unnecessary to prove that any particular persons have ceased to deal with the plaintiff. On both grounds, therefore, I think the plaintiff is entitled to succeed, and the rule must be discharged.

*Rule discharged.*<sup>3</sup>

<sup>1</sup> 7 Bing. 211.

<sup>2</sup> 1 H. & N. 251; 26 L. J. Ex. 31.

<sup>3</sup> *Baldwin v. Flower*, 3 Mod. 120, *per* Wythens, J. *Accord.*

See also *Odgers*, Lib. & Sl. (2d ed.) 89-92. — ED.

## CHARLES HAMON v. JOSUÉ JOSUÉ GEORGE FALLE.

IN THE PRIVY COUNCIL, FEBRUARY 7, 8, 1879.

[*Reported in 4 Appeal Cases, 247.*]

APPEAL from a judgment of the Royal Court of the Island of Jersey (July 23, 1877).

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE: <sup>1</sup>—

The plaintiff in this case is a master mariner holding a certificate from the Board of Trade. The defendant was, when the action was brought, the president of the Jersey Mutual Insurance Society for Shipping, and is sued as the representative of that society. The society is, as its name imports, a mutual insurance society for shipping, and is governed by the rules which were put in as part of the evidence before the court below, and are now before their Lordships. Some of those rules will have to be more particularly considered hereafter, but it is sufficient at present to state that the general course of business of the society seems to be that the different shipowners who become members of it underwrite each other's vessels in a certain proportion, and that the insurances effected are in the nature of time policies for one year.

The action is a peculiar one. The effect of the pleading in the nature of a declaration is as follows:—that the plaintiff holding the position which has been already mentioned, and having been employed as master of certain specified vessels, and in particular of the *Dora*, which then belonged to the late M. Félix Briard, his services were retained by M. James Sebire, the proprietor of the ship *Ulysses*; that he was getting ready to take the command of that vessel when he found that the insurance society had intimated to M. Sebire that if the plaintiff were to take command of her, the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution, or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family. And he prayed that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay the damages claimed to the amount of £500.

In the first instance, the society took the proceeding which is set out in the record, which is partly in the nature of a demurrer; but also sets forth the resolutions of the committee under which the telegrams which had passed between them and M. Sebire were sent, and which were in fact the cause of the plaintiff's non-engagement as master of the vessel.

<sup>1</sup> The opinion of the court is somewhat abridged. — Ed.

The effect of this pleading was to submit that there was no ground of action. The court, however, considering that the course adopted by the society had caused considerable damage to M. Hamon in preventing him from following his profession as a master mariner; that the resolutions of the committee produced by the defendant contained no *motif* or reason to justify the proceeding which the committee had thought fit to adopt; and that such a proceeding, if adopted — “*sans cause ou raison valable*” — without cause or valid reason, would be an arbitrary and vexatious act, that would give a right of action to the person who was subject to it; decided that the society ought to suffer the consequences of its act, unless it furnished sufficient grounds or motives to justify its conduct. Leave was given to appeal to the full court, the court of greater number; but the defendants have never availed themselves of that permission. Mr. Benjamin has, in argument, fairly admitted that the declaration must be taken to disclose a *prima facie* cause of action; and that the only question is whether the plea or *prétention* which the defendants filed under the last-mentioned order has been proved, and if proved constitutes a valid defence.

That *prétention* is to be found in the record. In substance it pleads that the committee of administration only took the course they did in consequence of the information which they had received from sources respectable in themselves and worthy of belief, and which in the opinion of the committee established that M. Hamon, when in command of the ship *Dora*, belonging to Messrs. Félix Briard & Co., had been guilty of and had given way to intemperance, and had conducted himself in such a way as not to deserve the confidence of its owners, who had dismissed him from their service; that in those circumstances, the committee not being able to have confidence in M. Hamon, and thinking that an insurance was a purely voluntary act on their part, had decided not to expose the society to the risk of becoming responsible for the fate of a ship which would be placed under the command of a man whom they had reason to believe was addicted to a vice criminal in any case, but still more so in the case of a man holding the position of master of a vessel; that having taken that determination, the committee confined themselves to communicating to M. Sebire, without letting him know in terms the information which they had received on the subject of M. Hamon, whom, so long as they could protect the interests of the society, they had no desire to injure. It further states that in support of their *prétention* the defendants produced the letter from M. Briard, which is to be found in the evidence, and which they say was brought by M. Hamon to the office of the society only a few days before the date of the correspondence between M. Sebire and the committee, and they contend that that letter alone justifies fully the conduct of the society against Hamon, and that it was of a kind and of a nature to inspire doubt with reference to him and distrust of him, and that they cannot be bound to furnish legal proof of the conduct of Hamon whilst he had the command of the vessel *Dora*, but that it sufficed that they

should have reasonable grounds for refusing to place their interest at the risk of the conduct or acts of Hamon.

The effect of the defence thus pleaded is clearly that the defendants acted in good faith and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The finding of the court that the act of the defendants would be arbitrary and vexatious, and that the defendants would be liable for damages unless they could show sufficient motives to justify what they did, points to that conclusion. Their Lordships further think that if the case is to be likened (as in the argument it has been) to an action for defamation it would fall within the rule thus laid down by Mr. Baron Parke in the case of *Toogood v. Spyring*: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." In the present case their Lordships think that the representation made by the society to Sebire was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned.<sup>1</sup>

The plaintiff having been admitted to appeal *in forma pauperis*, there will of course be no order as to costs.

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### RATCLIFFE v. EVANS.

IN THE COURT OF APPEAL, MAY 26, 1892.

[Reported in *Law Reports* (1892), 2 *Queen's Bench*, 524.]

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q. C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the good-will of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons;" that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the "County Herald," circulated in Flintshire and some of the adjoining counties,

<sup>1</sup> *Bowen v. Matheson*, 14 All. 499 *Accord.* — Ed.

and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the "County Herald," certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published *bona fide*; and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff, for £120, with costs.

The defendant appealed.

*Bowen Rowlands*, Q. C., and *E. H. Lloyd*, for the appellant.

*F. Marshall*, for the respondent.<sup>1</sup>

*Cur. adv. vult.*

The following judgment of the court (LORD ESHER, M. R., BOWEN, and FRY, L. JJ.), was read by

BOWEN, L. J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the "County Herald," a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of dam-

<sup>1</sup> The arguments of counsel are omitted. — ED.



age was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White*.<sup>1</sup> In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage:" *Cane v. Golding*; <sup>2</sup> "damage in fact," "special or particular cause of loss:" *Law v. Harwood*,<sup>3</sup> *Tasburgh v. Day*.<sup>4</sup>

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson v. Moore*,<sup>5</sup> *Rose v. Groves*.<sup>6</sup> In this judgment we shall endeavor to avoid a term which, intelligible enough in particular contexts, tends,

<sup>1</sup> 2 Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268, *per* Holt, C. J.

<sup>2</sup> Sty. 169.

<sup>3</sup> Cro. Car. 140.

<sup>4</sup> Cro. Jac. 484.

<sup>5</sup> 1 Ld. Raym. 486.

<sup>6</sup> 5 M. & G. 613.

when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business — a falsehood which is not actionable as a personal libel, and which is not defamatory in itself — is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson v. Moore*,<sup>1</sup> in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage" — says Pollock, C. B., in *Harrison v. Pearce*,<sup>2</sup> — "it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck v. Lovering*,<sup>3</sup> under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram v. Lawson*.<sup>4</sup> Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander,

<sup>1</sup> 1 Ld. Raym. 486.<sup>2</sup> 32 L. T. (O. S.) 298.<sup>3</sup> 1 Times L. R. 497.<sup>4</sup> 6 Bing. N. C. 212.

but from its unauthorized repetition: *Ward v. Weeks*,<sup>1</sup> *Holwood v. Hopkins*,<sup>2</sup> *Dixon v. Smith*.<sup>3</sup> General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable *per se* general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans v. Harries*<sup>4</sup> was a slander uttered in such a manner. It consisted of words reflecting on an inn-keeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn—a floating and transitory class. The court held that general evidence of the decline of business was rightly receivable. “How,” asked Martin, B., “is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?” *Mac-loughlin v. Welsh*<sup>5</sup> was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley v. Harrison*.<sup>6</sup> From libels and slanders actionable *per se*, we pass to the case of slanders not actionable *per se*, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law v. Harwood*.<sup>7</sup> Many such instances are collected in the judgments in *Iveson v. Moore*,<sup>8</sup> where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said—in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim—“damages in the ‘*per quod*,’ where the ‘*per quod*’ is the gist of the action, should be shown certainly and specially.” But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may

<sup>1</sup> 7 Bing. 211.<sup>2</sup> 5 H. & N. 450.<sup>3</sup> 10 Ir. L. Rep. 19.<sup>7</sup> Cro. Car. 140.<sup>2</sup> Cro. Eliz. 787.<sup>4</sup> 1 H. & N. 251.<sup>6</sup> 1 Esp. 50.<sup>8</sup> 1 Ld. Raym. 486.

here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. *Hartley v. Herring*<sup>1</sup> is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: *Dixon v. Smith*,<sup>2</sup> *Hopwood v. Thorn*.<sup>3</sup> The broad doctrine is stated in Buller's *Nisi Prius*, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy v. Soper*. The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe v. Harewood*,<sup>4</sup> *Cane v. Golding*,<sup>5</sup> *Tasburgh v. Day*,<sup>6</sup> *Evans v. Harlow*.<sup>7</sup> But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson v. Stuart*,<sup>8</sup> *Lord Arlington v. Merricke*,<sup>9</sup> *Grey v. Friar*,<sup>10</sup> *Westwood v. Cowne*,<sup>11</sup> *Iveson v. Moore*.<sup>12</sup> In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to

<sup>1</sup> 8 T. R. 130.<sup>3</sup> 19 L. J. (C. P.) 95.<sup>5</sup> Sty. 176.<sup>7</sup> 5 Q. B. 624.<sup>9</sup> 2 Saund. 412, n. 4.<sup>11</sup> 1 Stark. 172.<sup>2</sup> 5 H. & N. 450.<sup>4</sup> W. Jones, 196.<sup>6</sup> Cro. Jac. 484.<sup>8</sup> 1 T. R. 754.<sup>10</sup> 15 Q. B. 907; see Co. Litt. 303 d.<sup>12</sup> 1 Ld. Raym. 486.

be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave v. Le Breton*,<sup>1</sup> decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, (that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible.) In *Hargrave v. Le Breton*<sup>1</sup> it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press — probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in *Riding v. Smith* can be justified, it must be justified on the ground that the court (rightly or wrongly) believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

*Appeal dismissed.*

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DEAN DUDLEY v. RICHARD F. BRIGGS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 8, 1886.

[Reported in 141 *Massachusetts Reports*, 582.]

TORT. Writ dated September 18, 1885. The declaration was as follows: —

"And the plaintiff says that he is, and has been for many years, a compiler and publisher of directories of cities, towns, and counties in

<sup>1</sup> 4 Burr. 2422.

this Commonwealth and elsewhere; that by care, attention, skill, and faithfulness, and after great labor and expense, he had acquired a large number of subscribers among business men and other people, throughout the cities and towns of Bristol County, and elsewhere in this Commonwealth, for 'The Bristol County Directory,' which the plaintiff has compiled and published biennially for many years, and until the acts and doings of the defendant hereinafter complained of; that, at great labor and expense, he had acquired a large and valuable list of advertisers in his said directory, from whom, as well as from the said subscribers to said directory, he obtained a large income, and would have continued to do so, but for the acts and doings of the defendant hereinafter alleged and set forth.

"And the plaintiff says that, according to his usual and ordinary custom in the compilation and publication of the said 'The Bristol County Directory,' he would have compiled and published the same in this year, A. D. 1885, and he made his preparations therefor, but he says that the defendant and his canvassers, and other servants and agents, in order to injure the plaintiff, and to deprive him of the opportunity of compiling and publishing said directory for said year of 1885, and thereafterwards, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise to injure the plaintiff and get gain, profit, and advantage to the defendant, knowingly and wilfully, falsely and fraudulently, pretended and represented to many persons, and particularly to the plaintiff's patrons, the advertisers in said directory and the subscribers thereto throughout said Bristol County, that the plaintiff had gone out of the business of compiling and publishing said directory, that the plaintiff had sold out said business to the defendant, that the said canvassers and the defendant's other servants and agents were compiling the materials for the plaintiff's directory, the same as formerly, and other false and fraudulent representations then and there made, of which the plaintiff is not yet fully informed, and thereby deceitfully and wrongfully induced the plaintiff's said patrons, advertisers, and subscribers, in and throughout said Bristol County, to give to the defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor.

"Whereas, in truth and in fact, the said representations were wholly false and untrue; the plaintiff had neither gone out of the business of compiling and publishing the said directory, as he had done for years before, nor had he sold out to the defendant, nor had he any intention of doing so; nor were the defendant and his canvassers, and other agents and servants, compiling the said directory the same as formerly or for the plaintiff; all of which the defendant, as well as his said canvassers and other servants and agents, well knew. And the defendant did knowingly, wrongfully, injuriously, and deceitfully compile and publish the said 'The Bristol County Directory,' for the year A. D. 1885, and vend and sell the same to the plaintiff's patrons, advertisers, sub-

scribers, and other persons, as aforesaid. And the plaintiff says that thereby he has been prevented from compiling, publishing, and selling his said directory this year, A. D. 1885, as he has always done heretofore; that he has lost the great gains and profits which he would otherwise have made and received from the sale thereof, and from advertisers in and subscribers to said directory, and has been put to great loss and expense in preparing for said compilation and publication, till he learned of the defendant's said act and doings, and thereby he will be hereafter prevented from compiling and publishing said directory except at an increased expense and with diminished profits."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer; and ordered judgment for the defendant. The plaintiff appealed to this court.

*J. C. Coombs* and *N. U. Walker*, for the defendant.

*S. H. Dudley*, for the plaintiff.

FIELD, J. The plaintiff in his declaration does not allege that, by the acts of the defendant, he has been deprived of the benefit of any contract he had made, or of any property in existence and in his possession, or that the defendant published his directory for 1885 as a directory prepared and published by the plaintiff; and does not bring his case within such decisions as *Lumley v. Gye*, *Marsh v. Billings*,<sup>1</sup> *Thomson v. Winchester*,<sup>2</sup> *Blofeld v. Payne*, *Morison v. Salmon*,<sup>3</sup> and *Sykes v. Sykes*.<sup>4</sup>

He does not allege that he had any copyright in the previous publications which the publication of the defendant infringed; and the courts of the Commonwealth have no jurisdiction over infringements of copyright. If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this, — that he intended to publish a directory for 1885, whereby he expected to make profits, but, by reason of the acts of the defendant, he abandoned such an intention, and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property. *Bradley v. Fuller*.<sup>5</sup>

An attempt has been made to bring this case within what is called slander of goods, manufactured and sold by another. See *Western Counties Manure Co. v. Lawes Chemical Manure Co.* This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging the plaintiff's business. We think that the declaration does not show that the business of the plaintiff, in publishing a new directory every two years, was a continuous business. The directory to be published in 1885 was to be a new compilation and publication. From the nature

<sup>1</sup> 7 Cush. 322.

<sup>2</sup> 19 Pick. 214.

<sup>3</sup> 2 M. & G. 385.

<sup>4</sup> 3 B. & C. 541.

<sup>5</sup> 118 Mass. 239.

of the book, perhaps this could not well be otherwise. New subscribers and new advertisements were to be obtained. We have been shown no case where it has been held that a false statement that the plaintiff had gone out of business, or sold out his business to the defendant, was an actionable slander of a person in his trade; but upon this we express no opinion. It may be said that such statements tend to injure a man in his business, because they tend to prevent customers from resorting to him for trade, and to injure the value of the good-will of his business. However this may be, the difficulty is in attaching good-will as a valuable thing to the publication every two years of a new directory. Such a directory could be published by anybody. It is perhaps a question of degree whether the publication by the plaintiff had been so frequent and regular that there can be said to be a good-will that would be protected in law. There is no allegation of any continuing contract, express or implied, of subscribing for, or advertising in, the directories, as a publication periodically issued; there is no allegation of any place of business to which customers resorted to purchase directories. Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think that there was any business of publishing a directory for 1885 carried on by the plaintiff, or anything that, for example, could have been sold as a going concern by an assignee in insolvency, if the plaintiff had become an insolvent debtor. The cases upon liability for wrongful interference with the business of another are largely collected in *Walker v. Cronin*; but in that case there was an actual business, with the carrying on of which the defendant wrongfully interfered. The declaration in this case, indeed, alleges that the plaintiff made his preparations for compiling and publishing a directory for 1885, but it does not allege what those preparations were, or that they were anything valuable. The averment that he "has been put to great loss and expense in preparing for said compilation and publication," near the end of the declaration, appears to be a part of the damages.

The plaintiff cites *Swan v. Tappan*; <sup>1</sup> but there the declaration was held insufficient, because there was no allegation of special damage. The declaration in the present case cannot well be distinguished in this respect from the declaration in *Swan v. Tappan*, but we do not deem it necessary to reconsider the decision in that case on this point. There, the plaintiff was actually engaged in selling his book, which had already been printed and put upon the market, and the action was the ordinary action for the malicious disparagement of the goods of another, manufactured and kept for sale.

The plaintiff relies upon *Benton v. Pratt*, <sup>2</sup> which perhaps may be considered as an extreme case. See *Randall v. Hazelton*. In *Benton v. Pratt*, Seagraves and Wilson, at Allentown, had orally agreed to purchase of the plaintiff two hundred hogs, at the market price, if delivered



within three or four weeks, and they had not been previously supplied ; and, “ about the time for the delivery,” the plaintiff was proceeding with his drove of hogs to Allentown for the purpose of delivering to them two hundred hogs. The defendant, by his falsehood and deceit, intentionally prevented the performance of this contract, by persuading Seagraves and Wilson that the plaintiff was not intending to drive his hogs to Allentown, whereby they were induced to buy the hogs of the defendant, instead of buying the hogs of the plaintiff, as they otherwise would have done. The court say, that it was “ not material whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not ;” but the agreement, if there was an agreement, although not in writing, was an actual offer by Seagraves and Wilson, not revoked, and which they would have performed, and the plaintiff was in the actual possession of the property which Seagraves and Wilson had offered to buy, and was actually proceeding to deliver this property to them, in accordance with their offer.

The fatal objection to the present case is, that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant’s acts ; but this, upon the principles stated in *Bradley v. Fuller*,<sup>1</sup> and the cases therein cited, is not sufficient to support an action.

*Judgment affirmed.*

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### MORASSE v. BROCHU.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1890.

[*Reported in 151 Massachusetts Reports, 567.*]

TORT for slander, by a physician against a Roman Catholic clergyman. Writ dated March 21, 1887. The declaration as amended was as follows : —

“ The plaintiff says that, before the speaking of the words herein alleged he was, hitherto had been, and still is a physician in regular practice in Southbridge, having the reasonable skill and qualification proper and necessary for the practice of that calling, business, and profession, and had always conducted himself therein with great diligence, industry, and propriety, and had acquired and was acquiring thereby great gain and profit from the practice of his said calling, business, and profession. He further says, he then was and still is living in lawful wedlock, having been lawfully married ; that he then was and still is a person of culture and education, and a person of good moral character and a Christian man, and

<sup>1</sup> *Ubi supra.*

had always behaved himself with propriety, as a good citizen and a Christian, and was then and still is a person fit for social intercourse and association, professional relations, and practice among the members of the Notre Dame Roman Catholic Church in that place, and among all Christian people, and with defendant himself. Nevertheless, the plaintiff says the defendant, well knowing the premises aforesaid, but intending to bring the plaintiff into public contempt, infamy, and disgrace with and among all his neighbors and all the members of the church aforesaid, and to cause it to be believed by them and the said members of the said church that the plaintiff was a person of bad character, and unfit to be employed in his said calling, business, and profession, and an improper person for social intercourse and association among persons of good moral and religious character, and to cause the plaintiff to be deprived of and to lose his said practice in his said calling, business, and profession, and employment therein, and of the gains and profits thereof, and of his social rank and standing aforesaid, and to degrade, vex, harass, and annoy the plaintiff by influencing and preventing the members of said church from employing the plaintiff in his said calling, business, and profession, did heretofore, on a certain day, to wit, on or about the 27th day of February last past, in a certain discourse which the defendant then uttered in the said Notre Dame Roman Catholic Church, and before and in the presence and hearing of the members of said church then and there assembled and congregated, publicly, falsely, and maliciously speak and publish of the plaintiff, in the French language, to said members of the said church and congregation then and there assembled understanding said language, the words following: [here followed words in the French language;] that the words being translated into the English language have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say: —

“ ‘ During my absence there was a scandal of a marriage by law in this parish, and you know who this person is. On my return from Europe, when I first heard of it, I thought I would say nothing about it, because I supposed he would not have the sympathies of the people. But I see it is not so, and, on the contrary, this person is gaining the sympathies and favor of the people, and they are running after this person, and they give him the first places. Why do you run after him so? Not long ago I was invited to a party where that person was, and I refused to go, because I would not meet an excommunicated person. If any of you are sick and want my assistance, you need not send for me if this person is there, because I will not be under the same roof with him.’ ”

“ The plaintiff further says, that the defendant then and there, and by the words then and there spoken, as above alleged, publicly, falsely, and maliciously accused the plaintiff, in his said calling, business, and profession, of being a person who was unfit to associate with persons of good moral and religious character, and to be received and employed

by such persons, and unworthy of their favors, thereby meaning the plaintiff, and then and there understood to be the plaintiff, by the audience and congregation then and there present.

“And the plaintiff says, that by means of the said grievances so committed by the said defendant, the plaintiff is greatly injured in his good name, fame, and credit, and in his said trade, calling, and profession, and brought into public scandal, infamy, and disgrace with and among the members of said Catholic church, and other good and worthy persons, and that such members of said church, and other good and worthy persons, have hitherto, by reason thereof, wholly refused and still do refuse to have any transactions, or discourse, or acquaintance with the plaintiff, as they were before accustomed to have, or to employ the said plaintiff in his said trade, calling, and profession, and would otherwise have had and done, whereby the said plaintiff has been deprived of the society of such members of the said church, and other good and worthy persons, and of the profits, income, and emoluments of his said trade, profession, and employment as aforesaid.”

The defendant demurred. The Superior Court overruled the demurrer.

At the trial before Thompson, J., the plaintiff testified that he was a physician engaged in the practice of his profession in Southbridge; that he was a member of the Roman Catholic church and of the parish of Notre Dame in Southbridge, of which the defendant was pastor; that his first wife obtained a divorce from him in February, 1886; that he was married again on May 3, 1886, at Southbridge, during the defendant's absence in Europe, by a justice of the peace; that by the canons of the Roman Catholic Church his act of marrying again excommunicated him from that church; that he did not attend church after the date of his second marriage; and that up to February 27, 1887, he was earning in his practice as a physician from eighteen hundred to two thousand dollars a year. The plaintiff was then permitted to testify, against the objection of the defendant, that there was a change in his business after February 27, 1887; that during the first week after that date he did not earn anything, and that subsequently he was not able to earn more than about one dollar per day, until at the end of four months he ceased to practice his profession in Southbridge.

Other witnesses testified to the words spoken by the defendant, and, while differing somewhat as to the exact words used by him, collectively testified substantially in support of all the words set forth in the declaration, and alleged to have been used by the defendant.

The judge refused to give instructions, requested by the defendant, but submitted the case to the jury under other instructions not excepted to, which permitted them to find that the words in question were spoken of the plaintiff in respect of his profession as a physician, and were defamatory and actionable *per se* without an averment of special damage.

The jury returned a verdict for the plaintiff, in the sum of \$1,500; and the defendant alleged exceptions.<sup>1</sup>

<sup>1</sup> The statement of the case is abridged. — Ed.

*J. Hopkins*, for the defendant.

*W. S. B. Hopkins*, (*A. J. Bartholomew* with him), for the plaintiff.

C. ALLEN, J. 1. The defendant contends that there is no sufficient averment of special damages.<sup>1</sup>

2. If there was a sufficient averment of special damages, then the question is, whether an imputation of the kind made by the defendant upon the plaintiff, when false, and when made for the express purpose of injuring the plaintiff in his profession, and when such injury is the probable and natural result of the speaking of the words, and when such injury actually follows, just as was intended by the defendant, will support an action by the plaintiff against the defendant.

It is sometimes said that it will not, unless the words are defamatory. But the better rule is, that such an imputation, whether defamatory of the plaintiff or not, will support an action under the circumstances above mentioned.<sup>2</sup> There are all the elements of a wrongful act deliberately done for the purpose of working an injury, and actually working one, even though the words have no meaning which, strictly speaking, could be called defamatory. *Riding v. Smith*, *Lynch v. Knight*,<sup>3</sup> *Barley v. Walford*,<sup>4</sup> *Green v. Button*,<sup>5</sup> *Trenton Ins. Co. v. Perrine*.<sup>6</sup> See also *Odgers, Libel and Slander*, 89, and at bottom of page 91, where the question is fully discussed. It may not be technically an action for slander, if the words are not defamatory; but the name of the action is of no consequence. In *Kelly v. Partington*,<sup>7</sup> *Littledale, J.*, suggested the following illustration: "Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?" And Sir John Campbell answers, "If the words were spoken falsely, with intent to injure, they would be actionable." In *Odgers, Libel and Slander*, 90, the following illustration is given: "If in a small country town where political or religious feeling runs very high, I maliciously disseminate a report, false to my knowledge, that a certain tradesman is a radical or a dissenter, knowing that the result will be to drive away his customers, and intending and desiring that result, then, if such result follows, surely I am liable for damages in an action on the case, if not in an action of slander." In such a case there is an intentional causing of temporal loss or damage to another, without justifiable cause, and with the ma-

<sup>1</sup> The court held the averment of special damages to be sufficient, on substantially the same reasoning as that of the court in *Ratcliffe v. Evans*, *supra*, p. 642.

<sup>2</sup> *Lally v. Cantwell*, 30 Mo. Ap. 524 (*semble*); *Hammond v. Hussey*, 51 N. H. 40 (false statement by teacher that an applicant for admission to the high school was not properly qualified) *Accord*.

See especially, *Odgers, Lib. & Sl.* (2d ed.) 89-92. — *Ed.*

<sup>3</sup> 9 H. L. Cas. 577, 600, *per Lord Wensleydale*.

<sup>4</sup> 9 Q. B. 197.

<sup>5</sup> 3 Zab. 402.

<sup>6</sup> 2 C. M. & R. 707.

<sup>7</sup> 5 B. & Ad. 645, 648.

licious purpose to inflict it, which will sustain an action of tort. *Walker v. Cronin*. And under this doctrine, in the opinion of a majority of the court, the present action may well stand.

3. But even if the averment of special damages is to be regarded as insufficient for want of naming the persons who would not employ the plaintiff as a physician, the question remains, whether the words are actionable *per se*, as containing a defamatory imputation upon the plaintiff; or, rather, whether there was enough in them to warrant the judge in submitting them to the jury.<sup>1</sup> *Exceptions overruled.*

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PAUL K. RANDALL v. H. L. HAZELTON AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY, 1866.

[Reported in 12 Allen, 412.]

THE declaration in this action, which was brought in this court, contained one count in tort and one in contract.<sup>2</sup>

The first count, in tort, set forth in substance that the plaintiff was possessed of an interest in, and had the possession of, an estate in Boston, subject to a mortgage given by a former owner thereof to the New England Mutual Life Insurance Company, which contained a power of sale authorizing the said mortgagees and their assigns, in case of default by the mortgagor, to sell and dispose of the premises at public auction, on the premises, first giving notice of the time and place of sale by publishing the same three weeks in a newspaper in the county of Suffolk, and to make and deliver a deed thereof to the purchaser; that he duly and regularly paid the interest on the debt secured by the mortgage as it fell due; that before the principal fell due the mortgagees, in reply to an inquiry put by him, assured him that they did not want the money to be paid to them when it should become due, but would give him ample notice when they should desire such payment: that he relied upon such promise and made no provision for the payment of the debt, as he otherwise might easily and would have done; that the mortgagees never gave him notice that they desired payment of the principal; that the defendants, contriving and conspiring together to obtain control of the mortgage, in order to deprive the plaintiff of his property, falsely and maliciously represented to the mortgagees that he desired that the mortgage should be assigned to Edwin S. Merrill, whom they had requested to become the assignee thereof for their benefit, knowing said representation to be false; that they thereby

<sup>1</sup> The court answered this question in the affirmative. — Ed.

<sup>2</sup> The report upon the second count and the argument for the plaintiff are omitted. — Ed.

obtained from the mortgagees an assignment of the mortgage, and the mortgagees would not have assigned the same but for said fraudulent misrepresentations, and thereafter, the principal having become due, induced Merrill to appoint Nathan H. Hand, one of the defendants, as his agent, and the defendants thereupon privily entered upon the premises in the absence of the plaintiff and caused a certificate of their entry to be recorded, and afterwards caused an advertisement to be inserted in a newspaper of small circulation in the county of Suffolk, containing a notice of the time and place of sale of the premises, said advertisement being so expressed as not to indicate what real estate was thereby referred to; that the sale was accordingly made at an hour when the defendants knew that the plaintiff would be absent from home; and said Hand bought the same and took a conveyance thereof; that the plaintiff had no notice of the intended sale, or of the assignment of the mortgage, until after the completion of the sale, and he was compelled to pay to said Hand the sum of five hundred dollars to obtain a deed of the estate, and was otherwise injured.

The defendants demurred to the declaration, and the case was reserved by the Chief Justice for the determination of the whole court.

*S. Bartlett* and *G. S. Hale*, for the plaintiff.

*J. P. Converse* and *E. A. Kelly*, for the defendants.

COLT, J. The averment of conspiracy in the first count of the declaration cannot change the nature of the action, or add anything to its legal force and effect. The gist of the action is the tort committed and the damage resulting therefrom. To charge both defendants, it is necessary to prove a combination or joint action on their part, and the allegation of a conspiracy may be a proper mode of alleging such joint action; but for any other purpose it is wholly immaterial. If the action cannot be sustained against one of the defendants, then it must fail, although another person is included and a conspiracy alleged. *Parker v. Huntington*; <sup>1</sup> *Hutchins v. Hutchins*.<sup>2</sup>

The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there an action lieth. 3 Bulst. 95. Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. *Lobdell v. Baker*.<sup>3</sup> So in

<sup>1</sup> 2 Gray, 125.

<sup>2</sup> 7 Hill, 104.

<sup>3</sup> 1 Met. 201.

reference to the term "damage," the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled.

But a more important consideration in this connection is, that the damage which this doctrine contemplates must not only be caused by the fraud and misconduct of the defendant, but it must be the direct and immediate consequence of the wrongful act. The law looks to the proximate and not the remote cause of the injury. It were infinite, says Lord Bacon, to consider the causes of causes and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree. This is the only practical rule which, in view of the complication which surrounds this doctrine of causation, can be adopted in the administration of justice by human tribunals. Where the fraud and damage sustain this intimate relation of proximate cause and effect, and not otherwise, they are said to concur, in the sense of the proposition above stated.

Applying the doctrine thus explained to the plaintiff's case as stated in the first count, we are of opinion that he sets forth no legal cause of action. The declaration shows no consideration for the alleged promise of the mortgagees to inform the plaintiff, in case the amount of the debt should be wanted by them. It was an agreement not legally binding upon them. There was nothing in it to prevent them in law from proceeding to do all the acts in relation to advertising and selling the property which were done by the defendants; nor did it prevent them from assigning the mortgage. It cannot be said to be an invasion of any legal right for the defendants to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking. *Hutchins v. Hutchins*. It is not alleged that the defendants knew of

the alleged promise of the mortgagees. The false representation of a material existing fact for the purpose of procuring the transfer might have enabled the mortgagees to avoid it, or maintain an action for any loss sustained by them, but until avoided the title passed to the defendant. If the declaration had contained averments of a good legal consideration for the promise to give the notice to the plaintiff, then it would seem to follow that the plaintiff's remedy would be ample against the mortgagees for all loss suffered by him by reason of the breach of their agreement, leaving them to whatever remedy they might have against the defendants for the fraud practised by them. And this fact is said by Morton, J., in *Lamb v. Stone*,<sup>1</sup> which was a case like this, to be good ground for refusing relief; for if the plaintiff "may have redress by any of the forms of actions now known and practised, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen."

But the more important fact is, that this specific act of obtaining the assignment in the manner stated in itself produced no direct and immediate damage to the plaintiff. The damage resulted solely from the foreclosure and forced sale of the premises, and would have been no more and no less if the mortgage had not been assigned, and the mortgagees had pursued precisely the course charged upon the defendants in regard to the sale. It was undoubtedly a necessary step in order that the defendants might practise the alleged oppression; but it was not the immediate cause of the injury. The substantial, efficient and immediate cause of the loss to the plaintiff was the foreclosure and sale. And we are not permitted to go behind and inquire into the antecedent causes, near or remote. *Marble v. Worcester*; <sup>2</sup> *Tisdale v. Norton*.<sup>3</sup> We lay out of the case, therefore, that part of it which rests upon the false representations made to procure the transfer of the mortgage.

The cases cited by the plaintiff we think ought not to control us in this result. In *Benton v. Pratt*,<sup>4</sup> the court say, "Here is the assertion of an unqualified falsehood with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff." In the American note to *Pasley v. Freeman*,<sup>5</sup> this case, it is said, certainly goes very far; but whether open to criticism or not in its main doctrine, it differs in the material point above indicated from the present case. So in *Green v. Button*,<sup>6</sup> it was held that the damage to the plaintiff by delaying him in his work and injuring his credit directly resulted from the defendant's act. In the *Tunbridge Wells Dippers' Case*,<sup>7</sup> while the court remark that there was a real damage in depriving the plaintiff of some gratuity, they also say in the same sentence that the injury was by disturbing the dippers in the exercise of their right or employment, which it seems by some private statute they were entitled to.

<sup>1</sup> 11 Pick. 532.

<sup>4</sup> 2 Wend. 385.

<sup>6</sup> Tyrwh. & Grang. 118.

<sup>2</sup> 4 Gray, 395.

<sup>5</sup> 2 Smith's Lead. Cas. 153.

<sup>7</sup> 2 Wils. 414.

<sup>3</sup> 8 Met. 388.



The remaining features of the first count are more rapidly disposed of. They relate to acts of the defendants in connection with the entry, advertisement and sale of the property. It is not contended that these acts were not in compliance with the provisions of law and the power of sale. Indeed, the theory of the case is, that the sale was legal, and so the plaintiff was compelled to pay his money to repurchase the estate. As already suggested, no action can be maintained against one on account of the exercise of a legal right, whatever the motive that dictated such exercise. *Bragg v. Raymond*; <sup>1</sup> *Lamb v. Stone, ubi supra*; *Wellington v. Small*; <sup>2</sup> *Sedgw. on Dam.* (3d ed.) 31.

*Demurrer sustained.*

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PETER O'CALLAGHAN v. MICHAEL CRONAN AND ANOTHER.

IN SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 10, 1876.

[Reported in 121 *Massachusetts Reports*, 114.]

TORT against Michael Cronan and John Cronan. The declaration was as follows:—

“The plaintiff says that on or about August 4, 1870, by articles in writing, duly executed by both parties thereto, he formed a copartnership with John Cronan, one of the defendants, in the business of making clothing and buying and selling ready-made clothing, and by the terms of said articles said copartnership was to continue five years from its date aforesaid, and, at the time of the grievances hereinafter set forth, the said copartnership had a long time, to wit, the period of about two years, to run, and said company had always done and were then doing a large and profitable business, and the plaintiff expected and had reasonable cause to expect that large profits would accrue to him from the continued business of said firm up to the end of said period. And the defendants heretofore, to wit, on or about October 10, 1873, with the unlawful purpose of forcing and compelling the plaintiff to withdraw from said firm and to dispose of his interest therein to them or one of them, unlawfully conspired together to accomplish said unlawful purpose, and in pursuance thereof, by false and malicious representations, and by other unlawful inducements offered to various creditors of said firm, procured said creditors to attach on several writs all the stock in trade belonging to said firm, and to represent to the attaching officer that said goods so attached were liable greatly to depreciate in value, and to petition said officer to sell said goods forthwith on said writs. And the plaintiff says that said creditors, by reason of said false and malicious representations and inducements, did attach all of said goods, and petition for the sale of the same on said several writs as aforesaid; and said defend-

<sup>1</sup> 11 Cush. 274.

<sup>2</sup> 3 Cush. 148.

ants, in further pursuance of said unlawful purpose, induced said officer, and said officer threatened to sell all said goods in the lump, whereby the same were liable to be sacrificed and sold for much less than their true value. And the plaintiff says that by said unlawful means he was forced to and did withdraw from said firm against his will, and give up and surrender the large profits he reasonably hoped to make in the prosecution of said business in said firm, and sell and dispose of his interest in said goods for much less than its true value."

Michael Cronan died pending the action, and John Cronan demurred to the declaration on the ground that it set forth no cause of action.

In the Superior Court the demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

*H. Fales*, for John Cronan.

*T. G. Kent*, for the plaintiff.

GRAY, C. J. The allegations of conspiracy, illegality, falsehood and malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful. *Adler v. Fenton*; <sup>1</sup> *Bowen v. Matheson*.<sup>2</sup> No such unlawfulness appears upon the face of this declaration. The purpose of compelling the plaintiff to withdraw from the firm was not in itself unlawful; and the means are not shown to be unlawful, for the plaintiff's creditors, upon the allegations in the declaration, had a lawful right to attach his property and to petition the officer to sell the goods attached. The declaration therefore shows no cause of action.

*Judgment for the defendant.*

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W. B. HUTCHINS v. B. B. HUTCHINS, impleaded, &c.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1845.

[Reported in 7 *Hill*, 104.]

*By the Court*, NELSON, C. J.<sup>3</sup> The case is substantially this: — The father of the plaintiff devised to him, in due form of law, a farm consisting of one hundred and fifty-one acres of land. The defendant, being aware of the fact, and intending to deprive the plaintiff of the benefit and advantage of the devise, and of his expected estate and interest in the farm, falsely and maliciously represented to the father, that, after his decease, the plaintiff intended to set up a large demand against the estate, which would absorb the greater part of it, and thus deprive the other children of their just share; at the same time defaming and calumniating the character of the plaintiff in several particulars. By these fraudulent means the defendant prevailed upon the father to

<sup>1</sup> 24 How. 407.

<sup>2</sup> 14 Allen, 499.

<sup>3</sup> Only the opinion of the court is given, and that somewhat abridged. — Ed.

revoke and cancel the will, and to make and execute a new one, by which the plaintiff was excluded from all participation in his father's estate.

This is the substance of the case, in its strongest aspect, as presented by the pleadings; and the question arises whether any actual damage, in contemplation of law, is shown to have been sustained by the plaintiff?

Fraud without damage, or damage without fraud, gives no cause of action; but where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion\* of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the cases referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable; and where the deprivation of any present substantial advantage, even though gratuitous, such as the loss of customers, of a permanent home at a friend's, or advancement in life, and such like, if the immediate and direct consequence of the words, will sustain the action.<sup>1</sup> If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that species of injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action.

But the law applicable to the cases referred to proceeds upon the

<sup>1</sup> 1 Starkie on Slander, 158 to 186, Ed. of 1843.

ground that the plaintiff, by the wrongful act complained of, has been deprived of the present, actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind, or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest which might indeed influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

*Ordered accordingly.*

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HERMAN RICE AND OTHERS v. WILBUR J. MANLEY.

IN THE COURT OF APPEALS, NEW YORK, 1876.

[Reported in 66 New York Reports, 82.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 2 Hun, 492.)

*Wilkes Angel*, for the appellants.

*J. R. Jewell*, for the respondent.<sup>1</sup>

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus County. There had been no compliance with the Statute of Frauds so as to make the agreement binding upon either party, but both parties would have performed it but for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could sell the cheese and plaintiffs did not care for it. He took the despatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of this fraud; but the General Term reversed the judgment, holding, upon the authority of the case of *Dung v. Parker*,<sup>2</sup> that the

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> 52 N. Y. 494.

plaintiffs could recover no damage, because the agreement for the sale of the cheese to the plaintiffs, by Stebbins, was void by the Statute of Frauds.

It was said by Coke, J. (in 3 Bulst. 95), that "fraud without damage, or damage without fraud, gives no cause of action; but when these two concur an action lies." This language has been frequently quoted with approval by judges and text writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts. Fraud and falsehood are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom there is the damage and wrong necessary to create a cause of action. Ad. on Law of Torts, 25. In 2 Hilliard on Torts, 75, the learned author lays down the rule as follows: "In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself;" and it must also be added that plaintiff was deceived and damaged.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage, so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. Kerr on Frauds, 274, and cases cited; Bacon Ab., Fraud, B. Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud.

The case of *Benton v. Pratt*<sup>1</sup> is quite in point, and is conceded by the learned judge who wrote the opinion of the General Term to be a controlling authority for the maintenance of this action if not overruled.

In that case Seagraves & Wilson, of Allentown, Penn., had made a contract with the plaintiffs to purchase of him, to be delivered at a future day, twenty hogs, nothing having been done to make the con-

<sup>1</sup> 2 Wend. 385.

tract binding within the Statute of Frauds. While the plaintiff was driving his hogs and thus preparing to perform his contract, the defendants, knowing the facts, drove their hogs to Allentown, and fraudulently represented that plaintiff did not intend to deliver his hogs to Seagraves & Wilson, and thus induced them to buy their hogs; and when plaintiff arrived with his hogs, Seagraves & Wilson refused to take them solely because they had a full supply. That was a case where the plaintiff could not have enforced his contract against Seagraves & Wilson, and yet the court held that he could maintain an action of fraud against the defendants for damages sustained on account of the fraud. Judge Sutherland said: "There is the assertion on the part of the defendant of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive, and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action." He also said: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not; the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants."

In *Snow v. Judson*,<sup>1</sup> it was held that false statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact prevent such sales and injure the manufacturers in their business, constituted a cause of action. It has been held in many cases that a false representation, made with intent to injure one, and in relying on which he is injured, is a good cause of action, although no benefit accrues to the party making it, from the falsehood. *Pasley v. Freeman*,<sup>2</sup> *White v. Merritt*.<sup>3</sup> In the latter case it is said that the action will lie whenever there has been the assertion of a falsehood with a premeditated design, as to a fact, when a direct and positive injury arises from such assertions; and *Benton v. Pratt* is cited as authority. In *Green v. Button*,<sup>4</sup> the plaintiff had made a contract for the purchase of spruce battens for £11; upon the case, as presented to the court, the battens had not been delivered or paid for. The defendant, who had loaned the plaintiff the money to pay for the battens, went to the sellers and falsely and fraudulently represented, among other things, that he had a lien on the battens, and ordered and directed them not to deliver them. The sellers, being deceived by the representations, were induced not to deliver the battens, and the plaintiff suffered damage; and it was held that an action for the fraud could be maintained, although the sellers were under no obligation to deliver the battens.

The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced

<sup>1</sup> 38 Barb. 210.

<sup>3</sup> 7 N. Y. 352.

<sup>2</sup> 3 Term R. 51.

<sup>4</sup> 2 C. M. & R. 707.

to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

The case of *Dung v. Parker* is not in conflict with these views, and it was not there intended to overrule the case of *Benton v. Pratt*. In that case the defendant falsely represented that he had authority to lease, as agent for another, certain premises, and as such agent he contracted by parol to lease the premises to the plaintiff for the term of two years; in consequence of which plaintiff incurred expense to procure fixtures to fit up the premises. It was held that the plaintiff could not recover. In that case the parol lease was void under the Statute of Frauds, and if the defendant had possessed full authority to lease the premises, or if the contract had been made directly with the owner of the premises, it would have been without legal force or validity; and it was upon this ground that plaintiff was defeated. The rule was laid down, "that an agent, who falsely represents his authority to make a contract on behalf of another, is not liable in contract or tort, unless the principal would have been bound by the contract made if the agent had such authority." There was no proof that plaintiff could have procured a valid lease. But if it had been shown that the owner had agreed to give the lease and was willing to do so, and was prevented by the fraud of the defendant, a case would have been presented like this, and a different result would have been reached.

The order of the general term must be reversed, and judgment upon report of referee affirmed, with costs.

All concur.

*Order reversed, and judgment accordingly.*<sup>1</sup>

## WILLIAM P. HUGHES v. JAMES McDONOUGH.

SUPREME COURT OF JUDICATURE, NEW JERSEY, NOVEMBER, 1881.

[Reported in 43 *New Jersey Reports*, 459.]

ON writ of error.

The substance of the declaration was, that the plaintiff was a blacksmith and horseshoer by trade, of good character, &c.; that he had obtained the patronage of one Peter Van Riper, and that on a certain occasion he shod a certain mare of the said Van Riper in a good and workmanlike manner; that the defendant, maliciously intending to injure the plaintiff in his said trade, &c., "did wilfully and maliciously mutilate, impair and destroy the work done and performed by the said plaintiff upon the mare of the said Van Riper, without the knowledge

<sup>1</sup> *Benton v. Pratt*, 2 Wend. 385; *Rich v. N. Y. Co.*, 87 N. Y. 382, 398; *N. Y. Co. v. Chapman*, 118 N. Y. 288, 294 *Accord.* — Ed.

of the said Van Riper, by loosing a shoe which was recently put on by the said plaintiff, so that if the mare was driven, the shoe would come off easily, and thus make it appear that the said plaintiff was an unskilful and careless horseshoer and blacksmith, and that the said mare was not shod in a good and workmanlike manner, and thus deprive the said plaintiff of the patronage and custom of the said Van Riper."

The second count charges the defendant with driving a nail in the foot of the horse of Van Riper, after it had been shod by the plaintiff, with the same design as specified in the first count.

The special damage laid was the loss of Van Riper as a customer.

Argued at June term, 1881, before Beasley, Chief Justice, and Justices Scudder, Knapp and Reed.

For the plaintiff in error, *W. B. Guild, Jr.*

For the defendant, *S. Kalisch.*

The opinion of the court was delivered by

BEASLEY, C. J. The single exception taken to this record is, that the wrongful act alleged to have been done by the defendant does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was, that the wrong was done to Van Riper; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him, and that, consequently, the damages of the plaintiff were too remote to be made the basis of a legal claim.

+ But this contention involves a misapplication of the legal principle, and cannot be sustained. The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. The act had a twofold injurious aspect: it was calculated to injure both Van Riper and the plaintiff; and as each was directly damaged, I can perceive no reason why each could not repair his losses by an action.

The facts here involved do not, with respect to their legal significance, resemble the juncture that gave rise to the doctrine established in the case of *Vicars v. Wilcocks*.<sup>1</sup> In that instance the action was for a slander that required the existence of special damage as one of its necessary constituents, and it was decided that such constituent was not shown by proof of the fact that as a result of the defamation the plaintiff had been discharged from his service by his employer before the end of the term for which he had contracted. The ground of this decision was that this discharge of the plaintiff from his employment was illegal, and was the act of a third party, for which the defendant

<sup>1</sup> 8 East, 1.



was not responsible, and that, as the wrong of the slander became detrimental only by reason of an independent wrongful act of another, the injury was to be imputed to the last wrong, and not to that which was farther distant one remove. In his elucidation of the law in this case, Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment, that it "was a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." The class of cases to which this authority belongs, rests upon the principle that a man is responsible only for the natural consequences of his own misdeeds, and that he is not answerable for detriments that ensue from the misdeeds of others. But this doctrine, it is to be remembered, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties; for, in such instances, damage is regarded as occasioned by the wrongful cause, and not at all by those which are not wrongful. Where the effect was reasonably to have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. This principle is stated, and is illustrated by a reference to a multitude of decisions in Cooley on Torts, 70, *et seq.* . . .<sup>1</sup>

The principles thus propounded must have a controlling effect in the decision of the question now before this court, as they decisively show that the damage of which the plaintiff complained was not, in a legal sense, remote from the wrongful act. What, in point of substance, was done by the defendant, was this: he defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by word spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for the slander; and, plainly, no reason exists why the law should not afford a similar redress when the same injury has been inflicted by disreputable craft. It is admitted upon the record that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely, in the natural order of events, to proceed from such misconduct, but that it was the design of the defendant to produce such result by his act. Under such circumstances it would be strange indeed if the party thus wronged could not obtain indemnification by an appeal to the judicial tribunals.

<sup>1</sup> The learned judge here discussed McDonald v. Snelling, 14 All. 290, and Rigby v. Hewitt, 5 Ex. 242, and cited 2 Pars. Cont. 456; Dixon v. Fawcus, 30 L. J. Q. B. 137; Tarleton v. McGawley, Peake, 270; Bell and Midland Co., 10 C. B. N. S. 307; Keeble v. Hickeringill, 11 East, 574, *n.* — Ed.

## EVANS v. WALTON.

IN THE COMMON PLEAS, JUNE 11, 1867.

[*Reported in Law Reports, 2 Common Pleas, 615.*]

THE first count of the declaration stated that Louisa Evans was and still is the servant of the plaintiff in his business of a publican and victualler; and that the defendant, well knowing the same, wrongfully enticed and procured the said Louisa Evans unlawfully and without the consent and against the will of the plaintiff, her said master, to depart from the service of the plaintiff; whereby the plaintiff had lost the service of the said Louisa Evans in his said business.

Pleas: Not guilty; and that Louisa Evans was not the servant of the plaintiff, as alleged. Issue thereon.

The cause was tried before Pigott, B., at the last Spring Assizes at Oxford. The plaintiff was a licensed victualler in Birmingham, and was assisted in his business by his daughter Louisa, a girl about nineteen years of age, who served in the bar and kept the accounts. On the 10th of November, 1866, the daughter, with her mother's permission, which was procured by means of a fabricated letter purporting to be an invitation to her to spend a few days with a friend at Manchester, left the plaintiff's house and went to a lodging-house in the neighborhood of Birmingham, where she cohabited with the defendant, at whose dictation the above-mentioned letter had been written. On the 19th of November the daughter returned home, and resumed her duties for a short time, but ultimately left her home again, and on the 9th of February was again found cohabiting with the defendant at the same lodging-house.

On the part of the defendant it was submitted that, in order to sustain the action, in the absence of an allegation that the defendant had debauched the plaintiff's daughter, it was necessary to show a binding contract of service.

The learned Baron, after consulting Blackburn, J., intimated an opinion that the action would lie upon the declaration as framed; but he reserved to the defendant leave to move to enter a nonsuit if the court should be of opinion that in point of law the action was not maintainable,—the court to have power to draw any inferences of fact, and to amend the declaration if necessary, according to the facts proved.

The case was then left to the jury, who returned a verdict for the plaintiff, damages £50.

*Huddleston*, Q. C., in Easter term, obtained a rule *nisi*.

*Powell*, Q. C., and *J. O. Griffiths* (June 11) showed cause, submitting that the action would lie upon the declaration as it stood.

The court called on

*H. James* and *Jelf*, in support of the rule. There are two kinds of

action for loss of service, viz., an action for the seduction and consequent loss of service of a daughter, and an action for enticing away a servant. In order to sustain the first, it is not enough that there has been criminal intercourse, but it must be shown that that intercourse has resulted in pregnancy or other illness so as to cause a disability in the daughter to perform her accustomed duties: *Eager v. Grimwood*; *Boyle v. Brandon*; <sup>1</sup> but an actual contract of service need not be proved. It is not suggested that there is any such cause of action here. In *Sedgwick on Damages* (2d ed.), page 543, it is said that "although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover. In other words, without some damage to the plaintiff or master occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief." And for this *Eager v. Grimwood* is cited.

[BOVILL, C. J. *Eager v. Grimwood* is cited in *Smith's Leading Cases* (6th ed.), vol. i. p. 260, with evident disapprobation.]

No precedent is to be found without the allegation *per quod servitium amisit*. The action for seduction is an anomalous one.

[WILLES, J. Upon the first point, I think we are bound by the case of *Eager v. Grimwood*. The question is, whether the action may not be maintained for enticing the girl away from her father's service.]

To sustain an action for enticing away a servant, it is necessary to show a valid and binding contract of service, which has been broken through the procurement of the defendant. Actual service is not enough. Here, there was no contract, express or implied, for the breach of which the father could have sued his daughter. All that the defendant can be charged with having done is, inciting the daughter to do that which in the exercise of her own free will she had an undoubted right to do. If an action would lie for this, it would equally lie for inducing a daughter to quit her father's house for the purpose of marrying her.<sup>2</sup> See *Fitz. N. B.* 90 H. In *Cox v. Muncey*,<sup>3</sup> it was held by this court that no action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship; and the like was held as to a servant by the Court of Queen's Bench in *Sykes v. Dixon*.<sup>4</sup>

[BOVILL, C. J. At the end of Lord Denman's judgment, in *Sykes v. Dixon*, there is a remark which seems to be adverse to your view. "Then," says his Lordship, "it was argued, on the authority of *Keane v. Boycott*,<sup>5</sup> that the objection" (that is, to the validity of the contract)

<sup>1</sup> 13 M. & W. 738.

<sup>2</sup> The father can maintain no action in such a case: *Goodwin v. Thompson*, 2 Greene, 329; *Jones v. Tevis*, 4 Litt. 25; *Hervey v. Moseley*, 7 Gray, 479; *Beard v. Holland*, 59 Miss. 161, 164. Unless the daughter was induced to marry the defendant by the latter's fraud. *Mills v. Hobert*, 2 Root, 48; *Goodwin v. Thompson*, *supra*. — Ed.

<sup>3</sup> 6 C. B. N. S. 375.

<sup>4</sup> 9 Ad. & E. 693; 1 P. & D. 463.

<sup>5</sup> 2 H. Bl. 511.

“was not one which a third person could take: and that might be so in a case where the servant was *de facto* continuing in the service; but not here, where he had quitted his master, and taken his chance in hiring himself to the defendant.” Here the daughter was *de facto* continuing in the service of her father when the defendant seduced her therefrom.]

All the authorities were referred to in *Lumley v. Gye*, and amongst them *Blake v. Lanyon*; but in none of them was the action held to lie in the absence of a binding contract of service.<sup>1</sup>

BOVILL, C. J. The rule in this case was granted principally on the contention of the defendant's counsel that, in order to sustain the action, it was necessary to show that there was a binding contract of service between the father and the daughter. And for this proposition various text-books were referred to, and several cases cited, amongst which was that of *Sykes v. Dixon*.<sup>2</sup> But, when that case is looked at, I find no such principle involved in the decision. Indeed, in each of the cases, from the form of the declaration, it became necessary to prove some contract for service beyond that which the law would imply from the relation of the parties. No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to show the contrary. It is said that the case of seduction is anomalous in this respect. There is, however, no foundation for that assertion. In the case of an action for the seduction of a daughter, no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family. So, in the case of an action for assaulting the plaintiff's infant son or daughter, no evidence of service is necessary beyond that which the law will imply as between parent and child. In *Barber v. Dennis*,<sup>3</sup> the widow of a waterman, who, as was said, by the usage of Waterman's Hall, may take an apprentice, had her apprentice taken from her and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover. It was agreed that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master; but it was objected that the company of watermen is a voluntary society, and that being free of it does not make a man free of London, so that the custom of London for persons under one and twenty to bind themselves apprentices does not extend to watermen; which was agreed by all. Then it was said that the supposed apprentice here was no legal apprentice, if the indentures be not enrolled pursuant to the 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title. But Holt, C. J., said he would understand him an apprentice or servant *de facto*, and that would suf-

<sup>1</sup> A part of the argument and the concurring opinion of MONTAGUE SMITH, J., with which KEATING, J., agreed, are omitted. — ED.

<sup>2</sup> 9 Ad. & E. 693; 1 P. & D. 463.

<sup>3</sup> 6 Mod. 69; 1 Salk. 68.

fice against them, being wrong-doers. Again, in Fitz. N. B. 91 G, it is laid down that, “if a man ought to have toll in a fair, &c., and his servants are disturbed in gathering the same, he shall have trespass for assault of his servants, and for the loss of their service,” &c. To this is appended a note by Lord Hale: “Trespass for beating his servants, *per quod servitium amisit*, lies, although he was not retained, but served only at will. 11 Hen. IV. fol. 2, *per* Hull, accordant. And so if A retains B to be his servant, who departs into another county and serves C, A, before any request or seizure, cannot beat B; and, if he does, C shall have trespass against him (21 Hen. VI. fol. 9), and recover damages, having regard to the loss of service (22 Ass. 76): and the retainer is traversable. 11 Hen. VI. fol. 30.” These authorities, and the principle upon which the action for assaulting a servant is founded, would seem to show that an actual binding contract is not necessary. There is no allegation in this declaration of a hiring for any definite time. All that is alleged is, that the girl was the daughter and servant of the plaintiff. It cannot be doubted that the jury would infer from the facts that the relation of master and servant did exist, without any evidence of a contract for a definite time; and, if we are to draw inferences from the facts, I should come to the same conclusion. Then, was that relation put an end to? The service, no doubt, was one which would be determinable at the will of either party, as is said by Bramwell, B., in *Thompson v. Ross*.<sup>1</sup> That this kind of service is sufficient, I should gather from the language used by this court in *Hartley v. Cummings*,<sup>2</sup> and particularly from the judgment of Maule, J. That was an action for seducing workmen from the service of the plaintiff, a glass and alkali manufacturer, and harboring them after notice. It appeared that one Pike was in the service of the plaintiff, and the defendant induced him to leave. In giving judgment, Maule, J., says: “The objection urged on the part of the defendant is, that the agreement entered into by Pike with the plaintiff was one that gave the latter no right to compel Pike to serve him, inasmuch as it was void either for want of mutuality or because it was a contract to an unreasonable extent operating in restraint of trade. On the other side, it was insisted, upon the authority of *Keane v. Boycott*,<sup>3</sup> that it is quite immaterial, for the purpose of this action, whether the agreement was void or not; for that it is not competent to the defendants, who are wrong-doers, to take advantage of its invalidity. In answer to this, the case of *Sykes v. Dixon*<sup>4</sup> was cited on the part of the defendants, where it is said to have been decided by the Court of Queen’s Bench that such an objection may be set up by a third person not a party to the agreement. It is unnecessary to say whether that case may not be distinguished from the present, — there being no subsisting service that was interrupted by the act of the defendant, — because I am of

<sup>1</sup> 5 H. & N. 16.<sup>3</sup> 2 H. Bl. 511.<sup>2</sup> 5 C. B. 247.<sup>4</sup> 9 Ad. & E. 693; 1 P. & D. 463.

opinion that in this case there was a contract between Hartley and Pike, which was perfectly valid, notwithstanding the objections that have been urged." Whether or not there was a subsisting service seems to be the test. I think the jury properly assumed that there was a subsisting service here. It is said that the girl's services were not lost to the plaintiff by reason of the defendant's having enticed her away; for that, inasmuch as she afterwards returned to her father's house, the relation of master and servant was not put an end to by any act of the defendant's. I think, however, there was a sufficient interruption of the service to entitle the plaintiff to maintain the action, and that the rule to enter a nonsuit should be discharged.

WILLES, J. I am of the same opinion. I cannot look at it as an anomaly to hold that the daughter was the servant of her father at the time the defendant by his enticement induced her to forbear from rendering to her father the services which were due to him from her. There is a series of cases in the books, of which that in the Year-Book of 11 Hen. IV. fol. 2, is probably the first, to show that this action is maintainable. This case was followed by a very remarkable one of M. 22 Hen. VI. fol. 30, in which that doctrine is fully recognized, and where service at will and service upon a retainer are put upon the same footing with regard to any complaint of being wrongfully deprived of their fruits, and it is pointed out that the writ at common law ran, "*quare un tiel servientem meum in servitio meo existentem cepit et abduxit*," without alleging any contract or retainer. That runs so completely with the earlier case, and also with the doctrine of Lord Denman in *Sykes v. Dixon*,<sup>1</sup> and of Maule, J., in *Hartley v. Cummings*,<sup>2</sup> and also with the observations of Bramwell, B., in *Thompson v. Ross*, that I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gre* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost. As a question of fact, was the daughter in the service of her father at the time the cause of action arose? Was the relation of master and servant put an end to by her quitting her father's house by means of the false pretence to which the defendant induced her to resort? There was no proof that she quitted without any intention to return to her home. What pretence, then, was there for assuming that the service at will was put an end to? To use the language of Newton, J., in the case of 22 Hen. VI. fol. 30, it is no more than if a servant should absent herself for the purpose of going to church on the Sabbath day. Then, was the defendant guilty of any wrong

<sup>1</sup> 9 Ad. & E. 693, 699; 1 P. & D. 463.

<sup>2</sup> 5 C. B. 247.

in keeping her away from the plaintiff's service? I apprehend that, where the relation of master and servant exists, any fraud whereby the servant is induced to absent herself affords a ground of action. Somewhat the same sort of question arose in *Winsmore v. Greenbank*, where, in an action on the case for inducing the plaintiff's wife to continue absent, it was held to be sufficient to state that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion, &c., she did continue absent, &c., whereby the plaintiff lost the comfort and society of his wife," &c., without setting forth the means used by the defendant, or alleging that any adultery had been committed. There is really no difficulty when once the relation of master and servant at the time of the acts complained of is established. It was said that, inasmuch as none of the usual consequences, such as sickness or the birth of a child, resulted from the defendant's acts, no action is maintainable for the mere improper intercourse. Be it so, as there is an authority in favor of that position; but that only removes the charge of debauching the plaintiff's daughter out of the way. It does seem to me to be an extraordinary thing, and to reduce the argument to an absurdity, to say that the plaintiff would have had a sufficient cause of action against the defendant if the daughter had proved with child by him, and had gone back to her father's house and been confined there, and that the fact of the father having through his fraud been deprived of his daughter's services during the nine days' concubinage affords no ground of action. The conclusion I arrive at is, that it was a question for the jury whether at the time the daughter left her father's house there was an existing service *de facto*, and whether by the defendant's means and procurement that service was denied to the plaintiff. If both those questions were found against the defendant, the plaintiff was clearly entitled to the verdict. I think there was abundant evidence to support the finding, and that the rule must be discharged.

*Rule discharged.*<sup>1</sup>

<sup>1</sup> Whether it is an excess of fair competition to induce a servant at will to leave the plaintiff, and enter the service of the defendant, cannot be said to be definitely settled. In *Salter v. Howard*, 43 Ga. 601, the plaintiff prevailed; but in *Campbell v. Cooper*, 34 N. H. 49, the defendant was successful. The other cases commonly cited for the plaintiff are distinguishable. In *Sykes v. Dixon*, 9 A. & E. 693, and *Peters v. Lord*, 18 Conn. 337, the servant had left the plaintiff of his own head before entering the service of the defendant. In *Keane v. Boycott*, 2 H. Bl. 511, the defendant, a recruiting officer, officiously induced the servant to leave the plaintiff, in order to enlist as a soldier. In *Speight v. Oliveira*, 2 Stark. 493; *Morgan v. Molony*, 7 Ir. L. R. N. S. 101, 240; *Ball v. Bruce*, 21 Ill. 161; and *Noice v. Brown*, 39 N. J. 569, as in the principal case, the enticement was for an immoral purpose. In *Cox v. Muncey*, 6 C. B. N. S. 375, a father induced an apprentice at will to leave the master, but the motive of the father does not appear. See further, Clerk and Lindsell, Torts, 157.

To induce a servant who is under contract with the plaintiff to leave the latter at the expiration of the term of service, and to enter the defendant's service, is no more than lawful competition. *Nichol v. Martyn*, 2 Esp. 732; *Boston Manufactory v. Binney*, 4 Pick. 425. — ED.

SECTION II. (*continued*).

(c) BY FORCE OR THREATS.

GARRET v. TAYLOR.

IN THE KING'S BENCH, EASTER TERM, 1620.

[*Reported in Croke, James, 567.*]

ACTION on the case. Whereas he was a Freemason, and used to sell stones, and to make stone buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c.

After judgment by *nihil dicit* for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act nor insult: and causeless suits on fear are no cause of action.

*Sed non allocatur*: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action: and although it be not shown how he was possessed for years, by what title, &c., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.<sup>1</sup>

KEEBLE v. HICKERINGILL.<sup>2</sup>

IN THE QUEEN'S BENCH, TRINITY TERM, 1706.

[*Reported in 11 East, 574, note.*]

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, *et de quodam vivario, vocato* a decoy pond, to which divers wild fowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them: the defendant know-

<sup>1</sup> Dixon v. Dixon, 33 L. An. 1261 *Accord.* — ED.

<sup>2</sup> This case, though not within the letter, seems to be within the spirit of the title of this chapter. — ED.



ing which, and *intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl used to resort thither, and deprive him of his profit*, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond: and on the 11th and 12th days of November the defendant, *with design to damnify the plaintiff, and fright away the wild fowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wild fowl were frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

HOLT, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, first, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in

all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school; and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7, 8; 21 H. 6, 31; 9 H. 7, 7; 14 Ed. 4, 7; Vide Rastal. 662; 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.<sup>1</sup>

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IBOTTSON v. PEAT.<sup>2</sup>

IN THE EXCHEQUER, MAY 1, 1865.

[Reported in 3 Hurlstone & Coltman, 644.]

BRAMWELL, B.<sup>3</sup> I am also of opinion that the plaintiff is entitled to judgment. The declaration states that the plaintiff being possessed of certain land, the defendant unlawfully and with intent to drive and frighten away game then being on the land of the plaintiff, and to prevent him from shooting them, fired rockets and combustibles close to and over the land of the plaintiff, so as to be a nuisance to him. The defendant by his plea admits that the matter alleged is true, but sets up a right to do what is complained of for the purpose attributed to the defendant in the declaration, viz., to prevent him from shooting the game. Then what is the reason given? It is this:—"The game which I frightened was game which you enticed away from the Duke of Rutland's land, by placing corn and other food for them on your land; and therefore I, as the servant of the Duke, in order to prevent you from shooting the game, and from continuing to entice them, did the

<sup>1</sup> The rest of the opinion is omitted. This case was followed in Carrington v. Taylor, 11 East, 571. — ED.

<sup>2</sup> See note to preceding case. — ED.

<sup>3</sup> Only the opinion of BRAMWELL, B., is given. POLLOCK, C. B., MARTIN and PIGOTT, BB., concurred. — ED.

acts complained of." In my opinion that is a bad plea. There is nothing in point of law to prevent the plaintiff from doing that which the plea alleges he has done. I say "in point of law," because it cannot be contended for a moment that any action would lie against the plaintiff. As to the propriety of such conduct between gentlemen and neighbors I say nothing. Where a person's game is attracted from his land, he ought to offer them stronger inducements to return to it. It is like the case I referred to in the course of the argument, *Chasemore v. Richards*,<sup>1</sup> which shows that if a man has the misfortune to lose his spring by his neighbor digging a well, he must dig his own well deeper.

*Judgment for the plaintiff.*

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TARLETON AND OTHERS v. M'GAWLEY.

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 21, 1804.

[*Reported in Peake, 205.*]

THIS was a special action on the case. The declaration stated that the plaintiffs had sent a vessel called the "Bannister," with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to a part of the coast of Africa called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he well knowing the premises, but *contriving and maliciously intending to hinder and deter the natives from trading* with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the "Othello," of which he was master and commander, a certain cannon loaded with gunpowder and shot, at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c., and plaintiffs lost their trade.*

LORD KENYON. This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the court may hereafter be taken whether it will support an action. I am of opinion it will. Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due

<sup>1</sup> 2 H. & N. 168; 7 H. L. 349.

from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands.<sup>1</sup>

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ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1410.

[Reported in Year-Book, 11 Henry IV., folio 47, placitum 21.]

Two masters of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40*d.* or two shillings a quarter from each child, now they got only 12*d.*, to their damage, &c.

*Tillesley.* His writ is worthless.

*Skrene.* It is a good action on the case, and the plaintiffs have shown well enough how they are damaged; wherefore, &c.

HANKFORD, J. There may be *damnum absque injuria*. As if I have a mill, and my neighbor builds another mill, whereby the profit of mine is diminished, I shall have no action against him;<sup>2</sup> still I am damaged, *quod* THIRNING, C. J., *concessit*, and said that the instruction of children is a spiritual matter; and if one retains a master in his house to teach his children, it is a damage to the common master of the town, yet, I think, he will have no action.

*Skrene.* The masters of Paul's claim that there shall be no other masters in all London except themselves.

*Horton* demurred because the action was not maintainable.

HILL, J. There is no ground to maintain this action, since the plaintiffs have no estate, but a ministry for the time; and though another equally competent with the plaintiffs comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law.

*Skrene.* If a market is erected to the nuisance of my market, I shall have an assize of nuisance; and in a common case, if those coming to my market be disturbed or beaten, whereby I lose my toll, I shall have a good action on my case;<sup>3</sup> so here.

HANKFORD, J. Not the same case, because in the case put you have a freehold and inheritance in the market; but here the plaintiffs have no estate in the schoolmastership, &c., but for an uncertain time, and it

<sup>1</sup> St. Johnsbury Co. v. Hunt, 55 Vt. 570 (arrest of plaintiff's engineer on a malicious and baseless charge, whereby the running of plaintiff's train was delayed) *Accord.* — ED.

<sup>2</sup> Bract. fol. 221, a; Y. B. 22 Hen. VI., 14, pl. 23 *Accord.* — ED.

<sup>3</sup> Y. B. 14 & 15 Ed. III. (Rolls Series) 96; Y. B. 29 Ed. III. 18, b. *Accord.* — ED.

would be against reason for a master to be hindered from keeping school where he pleases, unless where a university was incorporated or a school founded in ancient times.

And the opinion of the court was that the writ would not lie. Wherefore it was awarded that they should take nothing, &c.

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THE MOGUL STEAMSHIP CO. LIMITED v. MCGREGOR  
& CO. AND OTHERS.

IN THE COURT OF APPEAL, JULY 13, 1889.

[*Reported in Law Reports, 23 Queen's Bench Division, 598.*]

BOWEN, L. J.<sup>1</sup> We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of ship-owners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of five per cent to all local shippers and agents who would deal exclusively with vessels belonging to the Conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year — a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor

<sup>1</sup> Only the opinion of BOWEN, L. J., is given. FRY, L. J., concurred, but LORD ESHER, M. R., dissented. The decision was afterwards affirmed in the House of Lords. '92, App. Cas. 25. — ED.

any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows:—First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight. Thirdly, the offer at Hankow of freights at a level which would not repay a ship-owner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field. Fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal wrong; see *Chasemore v. Richards*.<sup>1</sup> All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Council in *Rogers v. Rajendro Dutt*,<sup>2</sup> "that the act complained

<sup>1</sup> 7 H. L. C. 349, at p. 388.

<sup>2</sup> 13 Moore, P. C. 209.

of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (see *Bromage v. Prosser*; *Capital and Counties Bank v. Henty*, *per Lord Blackburn*<sup>1</sup>). The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence, *Tarleton v. M'Gawley*; the obstruction of actors on the stage by preconcerted hissing, *Clifford v. Brandon*,<sup>2</sup> *Gregory v. Brunswick*; the disturbance of wild fowl in decoys by the firing of guns, *Carrington v. Taylor*<sup>3</sup> and *Keeble v. Hickeringill*; the impeding or threatening servants or workmen, *Garret v. Taylor*; the inducing persons under personal contracts to break their contracts, *Bowen v. Hall*, *Lumley v. Gye*, — all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so

<sup>1</sup> 7 App. Cas. 741, at p. 772.<sup>2</sup> 2 Camp. 358.<sup>3</sup> 11 East, 571.

pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight?" It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the ship-owner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go, and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo ut alienum non lædas*. If engaged in actions which may involve danger to others, he ought, speaking



generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable : see *Chasemore v. Richards*.<sup>1</sup> If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy : see *Skinner v. Gunton*; <sup>2</sup> *Hutchins v. Hutchins*.<sup>3</sup> But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means : *O'Connell v. The Queen*; <sup>4</sup> *Reg. v. Parnell*; <sup>5</sup> and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the

<sup>1</sup> 1 H. L. C. 349.

<sup>2</sup> 1 Wms. Saund. 229.

<sup>3</sup> 7 Hill's New York Cases, 104; Bigelow's Leading Cases on Torts, 207.

<sup>4</sup> 11 Cl. & F. 155.

<sup>5</sup> 14 Cox, Criminal Cases, 508.

case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause — is evidence — to use a technical expression — of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible — would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity: see *Rex v. Waddington*; <sup>1</sup> to combine to purchase all the shares of a company against a coming settling-day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without “just cause or excuse?” If it was *bona fide* done in the use of a man’s own property, in the exercise of a man’s own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing-up of Erle, J., and the judgment of the Queen’s Bench in *Reg.*

<sup>1</sup> 1 East, 143.

*v. Rowlands*.<sup>1</sup> But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg. v. Rowlands*,<sup>2</sup> of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton v. Eckersley*,<sup>3</sup> is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decisions in *Cousins v. Smith*<sup>4</sup> is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his "Lives of the Chancellors." If indeed it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these were always necessarily injurious to the public — a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron *régime* of statutory monopolies, such confederations can ever be really successful — and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of

<sup>1</sup> 17 Q. B. 671.<sup>3</sup> 6 E. & B. 47.<sup>2</sup> 17 Q. B. 671, at. p. 687, n.<sup>4</sup> 13 Ves. 542.

trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

In my opinion, accordingly, this appeal ought to be dismissed with costs.

*Appeal dismissed.*<sup>1</sup>

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TEMPERTON v. RUSSELL AND OTHERS.

IN THE COURT OF APPEAL, APRIL 13, 14, 17, 1893.

[*Reported in Law Reports (1893), 1 Queen's Bench, 715.*]

APPLICATION by the defendants for judgment or new trial.

The plaintiff, a master mason and builder at Hull, sued the defendants, who were respectively the presidents and secretaries of three trade unions at Hull, called the Hull Branch of the Operative Bricklayers' Society, the Hull Branch of the Builders' Laborers' Society, and the Hull Branch of the Operative Plasterers' Society, and of a joint committee of such trade unions, and members of such committee, for (1) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2) for maliciously conspiring to induce certain persons not to enter into contracts with the plaintiff, by reason whereof the plaintiff sustained damage.

The case was tried before Collins, J., who directed the jury that to induce a person who had made a contract with another to break it, in order to hurt the person with whom it had been made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously, and that, if the jury were satisfied that the defendants or any of them had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and, if their object in doing so was to injure the

<sup>1</sup> *Payne v. Railroad Co.*, 13 Lea, 507 (Freeman and Turney, JJ., dissenting). *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Delz v. Winfree*, 80 Tex. 402, 405 (*semble*) *Accord.* — ED.

plaintiff in his trade in order to compel him to do something which he did not want to do, that would be "maliciously" in point of law, and a cause of action would be established. He also directed the jury in substance, that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable. He left the following questions to the jury: (1) Did the defendants or any of them maliciously induce the persons named (viz., Brentano, Gibson and others), or any of them, to break their contracts with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts? The jury found for the plaintiff, against all the defendants, on both heads, with £50 damages on the first and £200 damages on the second. The learned judge gave judgment for the plaintiff for those amounts, and for an injunction to restrain the defendants from inducing persons to refuse to take goods from the plaintiff, or endeavoring to induce persons to break their contracts with the plaintiff. The defendants moved for judgment or a new trial, on the ground that the learned judge misdirected the jury, and that there was no evidence to go to the jury in support of the plaintiff's claim against the defendants respectively.<sup>1</sup>

*Robson, Q. C., and H. T. Kemp*, for the defendants Russell and another (president and secretary of the Operative Bricklayers' Society).

*E. Tindal Atkinson, Q. C., and T. Willes Chitty, (F. G. Newbolt*, with them), for the other defendants.

*Lawson Walton, Q. C., and Montague Lush*, for the plaintiff.

LORD ESHER, M. R. In this case I propose first to state the facts of the case, as I understand the effect of the evidence, and then my views as to the law applicable to those facts. There appear to have been three trade unions formed in Hull, consisting respectively of persons employed in each of the three branches of labor connected with the building trade there. The members of such trade unions respectively agree together to form a union, to subscribe certain amounts, and to subject themselves to certain obligations, in consideration of which they are respectively to be entitled to certain benefits. The main condition upon which the members of the union are to be entitled to the benefits of membership is, that they will obey the directions given with regard to certain trade matters by the persons authorized by all of the members to give such directions. If they do not, they may be deprived of the benefits to which they would otherwise have been entitled or expelled from the union. Therefore the members of the union have given up their liberty of action in respect of certain matters, in the sense that they have bound themselves by agreement not

<sup>1</sup> The statement of the evidence is omitted, being substantially given in the opinion of LORD ESHER. The arguments of counsel and the concurring opinion of A. L. SMITH, L. J., are also omitted, and the opinion of LOPES, L. J., is abridged. — ED.

to exercise it on pain of losing certain benefits. These trade unions appear to have agreed together that certain rules, which they thought to be for their benefit, should be observed by the master builders of Hull, and that, if any builder would not observe such rules, they would act upon their respective members with a view to compelling him to do so. For this purpose they formed a joint committee, which appears to have been the authority appointed to determine what action should be taken by the individual members of the trade unions in respect of such building controversies, and, therefore, to have been for this purpose the agent of each of the trade unions, and of the individual members of them. Apparently this committee had power to delegate their authority to one or more individual members. I think that the evidence in this case proves that they did delegate such authority to the defendant Russell, who therefore acted in what he did as the delegate of such committee, and so of each of the three unions, and in a sense of each member of them. He, therefore, had authority to give directions to the individual members of the unions what to do in the case of building controversies. The trade unions and the joint committee seem to have come to the conclusion that a certain mode of carrying on building operations in Hull was detrimental to their interests or those of their constituents. They therefore agreed, as I have said, to a set of rules, one of which was the 9th rule<sup>1</sup> which has been referred to. As between themselves, the members of these trade unions had a perfect right to do that and to bind themselves to comply with such rules. But these rules could not bind any person who did not belong to such unions, and they had no right to enforce obedience to them by such a person. A firm of Myers & Temperton, who were builders in Hull, thought fit to carry on their business, as they had a perfect right to do, in a manner inconsistent with the terms of rule 9. The trade unions and their joint committee objected to this, and resolved to coerce the firm into carrying on their business in accordance with the rule. Failing to effect their object by direct action upon the firm, they endeavored to coerce them through the persons who dealt with them and who supplied them with the means of carrying on their business. Among these persons was the plaintiff, a brother of one of the members of the firm. They desired to coerce the firm by preventing these persons from dealing with them. The plaintiff refused to fall in with these views, and would not agree to cease dealing with his brother's firm. Having failed in preventing him from doing so by direct action upon him, they desired to overcome his resistance and to coerce him, in the same manner as

<sup>1</sup> This rule provided "that no member of the Operative Bricklayers' Society shall be permitted, under any circumstances, to contract for or take by measurement, either in the whole or part, any kind of brickwork, brick-pointing, or plastering, that may have been contracted for or sub-contracted for under the original contract, nor to take any work of any master builder who is building property for himself; and that no member of this society shall be allowed to work on such jobs; that no member of these societies be allowed to work on any job where labor alone is contracted for."

they had sought to coerce the firm, viz., through the persons who had dealings with him. The joint committee in effect said that, if any person connected with the building trade in Hull should deal with the plaintiff for materials, the members of the unions should refuse to work for that person upon goods supplied by the plaintiff. They intended thus to coerce the plaintiff to comply with their views, and they contemplated that, if he did not submit, his business would be destroyed. Though, of course, in point of law such other persons might be free to enter into contracts with the plaintiff, and would be bound to perform contracts made with him, as before, in point of fact the committee knew that the probable result would be that his business would come to an end, and they thought that the prospect of this would have a strongly coercive effect upon him.

They were not, I think, actuated in their proceedings by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure him in his business in order to force him not to do what he had a perfect right to do. Amongst those who had dealings with the plaintiff were two persons named Brentano and Gibson. The result of the evidence appears to me to be that the joint committee and the defendant Russell, who was acting as the delegate of such committee, knew that Brentano had entered into a contract with the plaintiff, and also, I think, that he would in the course of his business enter in the future into other contracts with the plaintiff of a similar description. Russell lets Brentano know that, if he goes on dealing with the plaintiff, harm will come to him, because none of the workmen at Hull who are comprised in the unions will touch the materials supplied by the plaintiff or will do his work. What was said by Russell to Brentano, and the previous resolution of the committee which was made known to Brentano, clearly had the object of preventing him from carrying out the contract he had already made with the plaintiff, and I should say that the inference any fair-minded man would draw would be that they also had the object of preventing Brentano from entering into contracts with the plaintiff in the future. The object was not to injure Brentano, but to injure the plaintiff in his business, in order to force him into obedience to the views of the unions. It was argued that the steps which the joint committee and Russell, their representative, took with regard to the men working for Brentano were only what they had a perfect right to take, that they merely gave notice or advice to such workmen that the rules were being infringed, and that they should withdraw from his employment if he carried out his contract with the plaintiff, and that the workmen could then do as they liked in the matter. It may be spoken of as "notice" or "advice" argumentatively; but those words do not represent the truth of the thing. These men had bound themselves to obey; and they knew that they had done so, and that, if they did not obey, they would be fined or expelled from the union to which they belonged. It was really an order which was given to them just as much

as a direction given to a servant is one. It might be said that such a direction is not an order, because the servant could not be compelled to obey it; but, if he does not, he will lose his place. The unions through their joint committee, as it appears to me, ordered their members employed by Brentano to cease to work for him if he performed his contract with the plaintiff, or if he went on dealing with the plaintiff. I think that the meaning of what Russell said to Brentano was that, if he had made a contract with the plaintiff and proceeded to perform that contract, his men would leave him; and that, if he went on dealing with the plaintiff in the future, the same result would follow. The intention was that by so acting on Brentano the plaintiff should be compelled to obey their directions, and, if he did not, that his business should be ruined. I think that there was clearly evidence to go to the jury against all the defendants of having been parties to these transactions. They were all members of the unions and of the joint committee, and they none of them went into the box except Russell, which they would have done if they could have denied that they were parties to them. The evidence against the defendants with regard to the dealings with Gibson is substantially to the same effect. This is not simply a case of men saying that they will not work for a master if he does certain things which they do not like. Brentano and Gibson were dealt with thus for the purpose of injuring the plaintiff, in order to force him into obedience to the policy of the unions, which they had no right to impose upon him.

Then what is the law applicable to these facts? The questions of law were dealt with in the argument of the defendants' counsel boldly but briefly, the main bulk of their arguments being directed to the endeavor to make out that there was no evidence that the defendants were responsible for the matters complained of. It was argued that the action for inducing persons to break a contract is confined to cases of master and servant or cases of personal service. But the case of *Bowen v. Hall* shows that the distinction relied on is not tenable. That was not a case of master and servant. In that case the majority of the judges in the Court of Appeal approved of the view taken by the majority of the judges in *Lumley v. Gye*. Their judgment, after stating that merely to persuade a person to break his contract may not be wrongful in law or fact, proceeds as follows: "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a nat-



ural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence." Nothing could be more directly in point to the present case with regard to the first ground of action set up. That case is an authority which is binding on us, and it appears to me to apply to the present case.

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate it appears to me that, on the principle acted on in the case of *Gregory v. Duke of Brunswick*, where defendants conspire or combine together maliciously to injure the plaintiff by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable. The judgments in the case of *Mogul Steamship Co. v. Macgregor, Gow & Co.*,<sup>1</sup> in the House of Lords, seem to show that such a combination if followed by damage to the plaintiff is actionable. With regard to what was there said, the counsel for the defendants relied on the distinction between an indictment and a civil action, and said that, though such a combination might be the subject of an indictment for conspiracy, it could not be the subject of an action for damages. I agree that there is this distinction, viz., that, in the case of an indictment, when the conspiracy is proved the indictment is proved, but in the case of an action it is necessary to go further and to prove damage. Therefore it will not suffice in an action, if the jury only find that the defendants agreed together to take an unlawful course of action, but they do not find that it was taken and that damage resulted to the plaintiff, or if there is no evidence on which the jury can find that damage resulted to the plaintiff. But, if there is evidence, and they do find, that damage resulted to the plaintiff, then I think what Lord Bramwell said in the case of *Mogul Steamship Co. v. Macgregor, Gow & Co.*<sup>1</sup> applies, and the action will lie. He said: "The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure: so that, if actionable when done by one, much more are they

<sup>1</sup> [1892] A. C. 25.

when done by several, and, if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful, if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several; the other is that the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes: *De minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime." It seems to me that that language recognizes the doctrine of law as being that, if there is an agreement to take an unlawful course of action which amounts to a conspiracy, and that conspiracy causes damage to the plaintiff, an action will lie in respect of such conspiracy. It appears to me, therefore, that the combination here entered into by the defendants was wrongful both in respect of the interference with existing contracts and in respect of the prevention of contracts being entered into in the future. I cannot doubt that there was evidence from which the jury might find that people were prevented from dealing with the plaintiff by the resolution of the joint committee and the action taken by the defendants, and that the plaintiff was thereby injured, and it appears to me that the jury have so found. For these reasons I think this application must be refused.

LOPES, L. J. The case which I think must govern our decision as to the first head of claim is *Bowen v. Hall*, which I understand to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case, which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation. That being the law on the subject, the jury found that the defendants did maliciously induce persons who had contracted with the plaintiff to break their contracts. It seems to me that there was abundant evidence to support that finding.

The second question in the case is with regard to inducing persons not to enter into contracts with the plaintiff. The question left to the jury as to that was, whether the defendants maliciously conspired to induce persons not to enter into contracts with the plaintiff, and such persons were thereby induced not to make such contracts. The jury answered that question in the affirmative. That being so, the question is whether, upon that finding, it is shown that the defendants committed an actionable wrong. I think that it is. I will state shortly what I

believe to be the law on the subject. The result of the authorities appears to me to be that a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom. That appears to me to follow from what was said in *Gregory v. Duke of Brunswick*, and in the House of Lords in the case of *Mogul Steamship Co. v. Macgregor, Gow & Co.*<sup>1</sup> It was argued here that there was no evidence that any persons were induced not to enter into contracts with the plaintiff. I cannot agree with that contention. I think there was sufficient evidence to that effect, and that injury was thereby occasioned to the plaintiff. For these reasons, I think that the verdict ought to stand, and this application should be dismissed.

*Application dismissed.*<sup>2</sup>

## SAMUEL WALKER AND OTHERS v. MICHAEL CRONIN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1871.

[*Reported in 107 Massachusetts Reports, 555.*]

WELLS, J.<sup>3</sup> The declaration, in its first count, alleges that the defendant did, “unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiffs from carrying on” their business of manufacture and sale of boots and shoes, “with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiffs,” and others “who were about to enter into” their employment, “to leave and abandon the employment of the plaintiffs, without their consent and against their will;” whereby the plaintiffs lost the services of said persons, and the profits and advantages they would otherwise have made and received therefrom, and were put to large expenses to procure other suitable workmen, and suffered losses in their said business.

This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice,) and (4) actual damage and loss resulting.

The general principle is announced in *Com. Dig. Action on the Case, A.*: “In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired

<sup>1</sup> [1892] A. C. 25.

<sup>2</sup> *Carew v. Rutherford*, 106 Mass. 1; *Van Horn v. Van Horn*, 52 N. J. 284 *Accord*. See *Dueber Co. v. Noyes*, 21 N. Y. Sup. 341. — Ed.

<sup>3</sup> Only the opinion of the court is given. — Ed.

in damages." The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of *Carew v. Rutherford*.<sup>1</sup>

In the case of *Keeble v. Hickeringill*, as contained in a note to *Carrington v. Taylor*, both actions being for damages by reason of frightening wild fowl from the plaintiff's decoy, Chief Justice Holt alludes to actions maintained for scandalous words which are actionable only by reason of being injurious to a man in his profession or trade, and adds: "How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit in his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege, the other is in respect of his property." After considering injuries to a man's franchise or privilege, he proceeds: "The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases." From the several reports of this case it is not clear whether the action was maintained on the ground that the wild ducks were frightened out of the plaintiff's decoy, as would appear from 3 Salk. 9, and Holt, 14, 17, 18; or upon the broader one, that they were driven away and prevented from resorting there, as the case is stated in 11 Mod. 74, 130. But the doctrine thus enunciated by Lord Holt covers both aspects of the case; as does his illustration of frightening boys from going to school, whereby loss was occasioned to the master. Of like import is the case of *Tarleton v. M'Gawley*, in which Lord Kenyon held that an action would lie for frightening the natives upon the coast of Africa, and thus preventing them from coming to the plaintiff's vessel to trade, whereby he lost the profits of such trade.

There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

Thus every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

One may dig upon his own land for water, or any other purpose,

<sup>1</sup> 106 Mass. 1, 10, 11.

although he thereby cuts off the supply of water from his neighbor's well. *Greenleaf v. Francis*.<sup>1</sup> It is intimated, in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial. *Frazier v. Brown*; <sup>2</sup> *Chatfield v. Wilson*; *Mahan v. Brown*; *Delhi v. Youmans*.<sup>3</sup> A similar decision was made in *Wheatley v. Baugh*; <sup>4</sup> but the suggestion in *Greenleaf v. Francis* was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of *Parker v. Boston & Maine Railroad*<sup>5</sup> was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause.

Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

It is a well-settled principle, that words, not actionable in themselves as defamatory, will nevertheless subject the party to an action for any special damages that may occur to another thereby. *Bac. Ab. Slander, C.* The same is true of words spoken in relation to property, or the title thereto, whereby the party is defeated of a sale, or suffers damage in any way. *Bac. Ab. Action on the Case, I.*; *Com. Dig. Action on the Case, C.* So also, if, by a wrongful claim of title or lien, the owner is prevented from perfecting a sale, or a purchaser from obtaining delivery to himself of goods, an action will lie. *Green v. Button*.<sup>6</sup>

In all these cases, the damage for which the recovery is had is not the loss of the value of actual contracts by reason of their non-fulfilment, but the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy. Indeed, it has been held that loss by the breach of contract, or the wrongful conduct of another than the defendant, would

<sup>1</sup> 18 Pick. 117.<sup>2</sup> 12 Ohio State, 294.<sup>3</sup> 50 Barb. 316.<sup>4</sup> 25 Penn. State, 528.<sup>5</sup> 3 Cush. 107.<sup>6</sup> 2 Cr. M. & R. 707.

not be recoverable as damages under a *per quod*. *Vicars v. Wilcocks*; <sup>1</sup> *Morris v. Langdale*; <sup>2</sup> *Bac. Ab. Slander, C.*

This doctrine has been doubted, especially in *Lumley v. Gye*, where the case of *Newman v. Zachary* is cited to the contrary. That was an action on the case, maintained for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized; the reason for the decision being, "because the defendant, by his false practice, hath created a trouble, disgrace and damage to the plaintiff." But the distinction is unimportant in a case like the present, where the damage to the plaintiffs is alleged to have been the direct result of the wrongful conduct of the defendant, and so intended by him; except that it is significant of the point that the existence and defeat of rights by contract are not essential to the maintenance of an action for malicious wrong, when the defendant has no pretext of justifiable cause.

The case of *Green v. Button*<sup>3</sup> is especially in point in this connection. The defendant, by means of a false claim of a lien, and of words discrediting the plaintiff, induced one who had sold goods to the plaintiff to refuse to deliver them, whereby he was injured in his business. The court, alluding to the doubts that had been expressed as to *Vicars v. Wilcocks* and *Morris v. Langdale*, and without deciding that question, distinguished the case under consideration, on the ground that, the goods not having been paid for, there was no absolute contract to deliver, upon which the plaintiff could have his remedy against the seller; that is, as the delivery was prevented by the wrongful conduct of the defendant, and there was no binding contract broken by the seller, therefore the plaintiff was entitled to recover in his action on the case *per quod*.

In *Gunter v. Astor*,<sup>4</sup> an action was maintained for enticing away workmen from their employment for a piano manufacturer. They were not hired for a limited time, but worked by the piece. The discussion indicates that damages were considered to be recoverable for the breaking up or disturbance of the business of the plaintiff, whereby he suffered the loss of his usual profits for a long period. The grounds of damage were apparently regarded as altogether independent of the mere loss of any contracts with the workmen.

In *Benton v. Pratt*,<sup>5</sup> it is held that proof of loss by the plaintiff of what he would otherwise have obtained, though there was no contract for it which he could enforce, will sustain an action for the wrongful conduct by which the loss was occasioned.

The difficulty in such cases is to make certain, by proof, that there has been in fact such loss as entitles the party to reparation; but that difficulty is not encountered in the present stage of this case, where all the facts alleged are admitted by the demurrer. The demurrer also

<sup>1</sup> 8 East, 1.

<sup>2</sup> 2 B. & P. 284.

<sup>3</sup> 2 Cr. M. & R. 707.

<sup>4</sup> 4 J. B. Moore, 12.

<sup>5</sup> 2 Wend. 385.

admits the absence of any justifiable cause whatever. This decision is made upon the case thus presented, and does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right of free expression of opinion. We have no occasion now to consider what would constitute justifiable cause.

The second and third counts recite contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes; and allege that the defendant, well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suffered great damage in their business.

It is a familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service, known to the defendant. It has sometimes been supposed that this doctrine sprang from the English Statute of Laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description.

In *Hart v. Aldridge*, it was applied to a case very much like the present.

In *Gunter v. Astor*,<sup>1</sup> it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer.

In *Sheperd v. Wakeman*,<sup>2</sup> it was applied to the loss of a contract of marriage by reason of a false and malicious letter claiming a previous engagement.

In *Winsmore v. Greenbank*, the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune.

In *Lumley v. Gye*, the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and Coleridge, J., dissented, insisting that the only foundation for such an action was the Statute of Laborers, which did not apply to service of that character; but after full discussion and deliberation it was held that the action would lie for the damages thus caused by the defendant.

In *Boston Glass Manufactory v. Binney*,<sup>3</sup> which was for inducing workmen, skilled in several departments of glass-making, to leave the

<sup>1</sup> 4 J. B. Moore, 12.

<sup>2</sup> Sid. 79.

<sup>3</sup> 4 Pick. 425.

employment of the plaintiff, it was not suggested that the defendants would not have been liable if there had been an existing contract between the plaintiff and the workmen.

Upon careful consideration of the authorities, as well as of the principles involved, we are of opinion that a legal cause of action is sufficiently stated in each of the three counts of the declaration.

*Demurrer overruled.*

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OLD DOMINION STEAMSHIP CO. v. McKENNA AND OTHERS.

IN THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF  
NEW YORK, FEBRUARY 25, 1887.

[*Reported in 30 Federal Reporter, 48.*<sup>1</sup>]

MOTION to discharge from arrest.

*Clarence A. Seward*, for plaintiffs.

*Louis F. Post* and *Samuel Ashton*, for defendants.

BROWN, J. This action was brought to recover \$20,000 damages alleged to have been sustained by the plaintiff through the unlawful action of the defendants in the recent strike of the longshoremen, and in their attempt to boycott the plaintiff in its business as a common carrier. The defendants are alleged to constitute, or to style themselves, an "Executive Board of the Ocean Association of the Longshoremen's Union." At the time of the commencement of the action they were arrested and held to bail under orders of arrest issued in conformity with the State practice. The defendants now move, upon the plaintiff's papers only, to vacate the order of arrest, on the ground that the material facts charged are alleged on information and belief only, without a sufficient statement of the sources of information; that the facts stated do not make out a *prima facie* case; that it appears that the defendants were acting within their legal rights; and that the plaintiff's loss, if any, is *damnum absque injuria*; and that, at best, the plaintiff's case is so doubtful that the order of arrest should not be sustained.

I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time, I can only state my conclusions:—

1. All the material averments are either stated positively, or the source of information is sufficiently indicated.

2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants, for the actual damages suffered, for the following reasons:—

(a) The plaintiff was engaged in the legal calling of a common car-

<sup>1</sup> 24 Blatchf 244, s. c. — Ed.



rier, owning vessels, lighters, and other craft used in its business, in the employment of which numerous workmen were necessary, who, as the complaint avers, were employed "upon terms as to wages which were just and satisfactory."

(b) The defendants, not being in plaintiff's employ, and without any legal justification, so far as appears, — a mere dispute about wages, the merits of which are not stated, not being any legal justification, — procured plaintiff's workmen in this city and in Southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendants' demands, and pay Southern negroes the same wages as New York longshoremen, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

(c) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business, and attempted to prevent the plaintiff from carrying on any business as common carrier, or from using or employing its vessels, lighters, &c., in that business, and endeavored to stop all dealings of other persons with the plaintiff, by sending threatening notices or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it, through threats of loss and expense in case they dealt with the plaintiff by receiving, storing, or transmitting its goods, or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts, and withheld their former customary business, greatly to the plaintiff's damage.

(d) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law, as well as by Section 168 of the Penal Code of this State.

(e) Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskilful, to the diligent and to the lazy, to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their prop-

erty or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, — are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable. See Greenh. Pub. Pol. 648, 653; *People v. Fisher*,<sup>1</sup> *Tarleton v. M'Gawley*, *Rafael v. Verelst*,<sup>2</sup> *Lumley v. Gye*, *Bowen v. Hall*, *Gregory v. Duke of Brunswick*, *Gunter v. Astor*,<sup>3</sup> *Reg. v. Rowlands*,<sup>4</sup> *Mogul St. Co. v. McGregor*, *Walker v. Cronin*, *Carew v. Rutherford*,<sup>5</sup> *State v. Donaldson*,<sup>6</sup> *Master Stevedores' Ass'n v. Walsh*,<sup>7</sup> *Johnston Co. v. Meinhardt*,<sup>8</sup> *Slaughter-house Cases*.<sup>9</sup>

3. There is no such doubt concerning the plaintiff's legal rights as should debar it from the usual remedy. The motion to discharge from arrest is therefore denied.

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### CURRAN v. GALEN AND OTHERS.

IN THE SUPREME COURT, SPECIAL TERM, NEW YORK, DECEMBER, 1892.

[Reported in 22 *New York Supplement*, 826.]

ACTION by Charles Curran against Louis Galen and others. Plaintiff demurs to the second count of the answer. Demurrer sustained.

*A. G. Warren*, for plaintiff.

*D. C. Feely*, for defendants.

ADAMS, J. The complaint in this action charges the defendants with conspiring to injure plaintiff in his business and character, and to prevent his obtaining employment. The defendants represent certain labor organizations in the city of Rochester. The plaintiff was in the employ of the Miller Brewing Company of the same city, and this company was a member of the Ale Brewers' Association. An agreement was entered into between the latter association and the local assembly of which the defendant Galen was president, by the terms of which no brewery belonging to the association was to employ any person not a member of defendants' organization, nor to retain in its employ for a longer period than four weeks any person who declined to join such organization. The plaintiff was not a member of the local assembly, and upon being solicited to join the same declined so to do. The defendants thereupon notified the Miller Brewing Company of this fact, and plaintiff was at once discharged from its employ. These facts constitute the conspiracy charged in the complaint, and they are like-

<sup>1</sup> 14 Wend. 1.

<sup>2</sup> 4 J. B. Moore, 12.

<sup>3</sup> 106 Mass. 1.

<sup>7</sup> 2 Daly, 1, 13.

<sup>9</sup> 16 Wall. 36, 116.

<sup>2</sup> 2 W. Bl. 1055.

<sup>4</sup> 17 Adol. & E. (N. S.) 671, 685.

<sup>6</sup> 32 N. J. Law, 151.

<sup>8</sup> 60 How. Pr. 168.

wise set forth at length in that portion of the answer demurred to, coupled with the allegation that defendants' acts were without any intent or purpose to injure the plaintiff. The sole question presented, therefore, is whether the defendants, in what they did, were acting lawfully. If they were, of course no charge of conspiracy will lie against them. It appears that the defendant, the Brewery Workingmen's Local Assembly 1,796, Knights of Labor, is one of the various labor organizations of the country. Its members are workingmen who have associated themselves together, ostensibly for co-operation and self-protection. In doing this they have violated no law, and so long as they have no unlawful object in view the legality of their organization cannot be questioned. For instance, the members of this local assembly may attempt, by co-operation, to increase their wages, and to that end may agree that they will work only for a certain price, or upon certain conditions, provided those conditions are lawful. *Carew v. Rutherford*.<sup>1</sup> But it has been held that co-operative effort, while lawful within certain limits, ceases to be so when coercion is employed to control the freedom of the individual in disposing of his labor or capital (*Snow v. Wheeler*<sup>2</sup>), and it seems to me that this is just where the defendants herein have overstepped the boundary line. Not satisfied with becoming members themselves of Local Assembly 1,796, they have insisted that as a condition of retaining his position in the employ of the Miller Brewing Company the plaintiff shall also join their organization, and, upon his refusing to comply with their demands, he has, by their direction, been deprived of his position, and of the opportunity which it affords him to earn a living. This looks very much like unlawful coercion, or, what amounts to the same thing, conspiracy. The defendants had a perfect right, as we have seen, to unite with this or any other labor organization, but they had no right to insist that others should do so, and when they make plaintiff's refusal to join it a pretext for depriving him of his right to labor, they interfere with his personal liberty in a manner and to an extent the law will not countenance, and their action, instead of affording a protection to, operates as a restraint upon, honest labor. There is a statute in force in this State which makes it a misdemeanor for an employer to require as a condition of a person's entering or remaining in his employ that he shall not become a member of any labor organization. Pen. Code, § 171 a. The object of this enactment was doubtless to prevent what the Legislature regarded as an improper interference by employers with the rights of their employes, and, if it is made illegal for the former to coerce the latter, it is difficult to see why it should not be equally unlawful for one employé to attempt to influence another's action by the same means. In passing upon a question somewhat similar to the one under consideration, which arose in the State of Massachusetts, Shaw, C. J., declares that "the legality of such an organization will depend upon the means

<sup>1</sup> 106 Mass. 1, 14.<sup>2</sup> 113 Mass. 179.

to be used for the accomplishment of its objects, and whether they be innocent or otherwise. *Com. v. Hunt.*"<sup>1</sup> It has been shown, I think, that one of the means employed by the defendants to accomplish the objects of their organization, and the one complained of, not only contravenes one of the fundamental principles of our free institutions, but it likewise violates the spirit, if not the letter, of a statute of this State. It follows, therefore, that the facts set forth in the second count of the answer herein by way of defence to plaintiff's cause of action constitute an unlawful act, and the demurrer must consequently be sustained.

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P. P. SHERRY AND OTHERS v. C. E. PERKINS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 19, 1888.

[*Reported in 147 Massachusetts Reports, 212.*]

W. ALLEN, J.<sup>2</sup> The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were used by the defendants as part of the scheme; and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute.<sup>3</sup> *Walker v. Cronin.* We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiffs' bill, and continued to be used at the time of the hearing. The injury was to the plaintiffs' business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the

<sup>1</sup> 4 Metc. (Mass.) 111-134.

<sup>2</sup> Only the opinion of the court is given. — ED.

<sup>3</sup> Pub. Sts. c. 74, § 2.

plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. *Gilbert v. Mickle*; <sup>1</sup> *Springhead Spinning Co. v. Riley*.<sup>2</sup>

*Boston Diatite Co. v. Florence Manuf. Co.*<sup>3</sup> was a case of defamation only. Some of the language in *Springhead Spinning Co. v. Riley* has been criticised, but the decision has not been overruled. See *Boston Diatite Co. v. Florence Manuf. Co.*, *ubi supra*; *Prudential Assurance Co. v. Knott*; <sup>4</sup> *Saxby v. Easterbrook*; <sup>5</sup> *Thorley's Cattle Food Co. v. Massam*; <sup>6</sup> *Thomas v. Williams*; <sup>7</sup> *Day v. Brownrigg*; <sup>8</sup> *Gaskin v. Balls*; <sup>9</sup> *Hill v. Davies*.<sup>10</sup> *Hermann Loog v. Bean*.<sup>11</sup>

*Decree for the plaintiffs.*

### DELZ v. WINFREE AND OTHERS.

IN THE SUPREME COURT, TEXAS, MARCH 24, 1891.

[Reported in 80 Texas, 400.]

HENRY, *Associate Justice*.<sup>12</sup> This suit was brought to recover damages by Bernard Delz against the members of the firm of Winfree, Norman & Pearson, and the members of the firm of Borden & Borden.

Plaintiff's petition stated his cause of action as follows: That he was pursuing the occupation of a butcher in the city of Galveston, and was making and would have continued to make large profits and gains in the business but for the grievances committed by the defendants as alleged; that in the prosecution of his business he had opened and was conducting two butcher shops in said city for the sale of different kinds of fresh meat; that it became necessary that he should buy live animals suitable and fit to be slaughtered for the purposes of his business as a butcher, and for a long time before and at the time of the commission by defendants of the grievances herein stated he was engaged in the business of buying live animals suitable and fit to be slaughtered and sold as fresh butcher's meat, and which he slaughtered and sold as such at his said two butcher shops; that the persons from whom plaintiff bought said live animals were engaged in the business of transporting to Galveston and receiving for sale live animals suitable and fit to be slaughtered and sold as butcher's meat, and in selling such live animals for such purposes to whomsoever would buy; that long before and at the time of the commission by defendants of the wrongs herein charged the defendants were engaged, and are now engaged, as sepa-

<sup>1</sup> 4 Sandf. Ch. 357.

<sup>4</sup> L. R. 10 Ch. 142.

<sup>7</sup> 14 Ch. D. 864.

<sup>10</sup> 21 Ch. D. 798.

<sup>2</sup> L. R. 6 Eq. 551.

<sup>5</sup> 3 C. P. D. 339.

<sup>8</sup> 10 Ch. D. 294.

<sup>11</sup> 26 Ch. D. 306.

<sup>3</sup> 114 Mass. 69.

<sup>6</sup> 14 Ch. D. 763.

<sup>9</sup> 13 Ch. D. 324.

<sup>12</sup> Only the opinion of the court is given. — Ed.

rate firms in said business of receiving and selling live animals for the purposes aforesaid on Galveston Island, and were and are now the only persons or association of persons so engaged in said business in Galveston County; that without justifiable cause and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent plaintiff from carrying on his said business and making a living thereby, the said Winfree, Norman & Pearson, on or about the 1st day July, 1889, and at divers times thereafter, and until the filing of this petition, did combine, confederate, and conspire with said firm of Borden & Borden, and with one Gerhard Barbour, a butcher, not to sell to petitioner for cash any live animals or slaughtered meat for the purposes or for the prosecution of his said business; that the said Winfree, Norman & Pearson solicited and procured from said Borden & Borden an agreement not to sell any live animals to plaintiff, and did so induce said Gerhard Barbour and others to plaintiff unknown not to sell to him slaughtered meat for the purposes of his said business.

The petition charges that in pursuance of said combination each of said firms subsequently refused to sell plaintiff live animals when he applied to them to purchase them at their own price in money which he then offered to pay them, and that said Gerhard Barbour likewise refused to sell him slaughtered meat; that by reason of such unlawful combination and malicious interference with his business, plaintiff was compelled to close up and discontinue his business in one of his two shops, and in order to continue it at the other one of his shops he has been and is now forced to buy slaughtered meat at a great disadvantage and at higher prices than he would have had to pay but for the aforesaid unlawful combination and malicious interference with and hindrance of his business by defendants.

The court sustained a general demurrer to the petition.

Appellant's assignment of error brings before us the correctness of this ruling.

The appellee contends that at common law "a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action. In other words an act which if done by one alone constitutes no ground of action cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several; that the true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable."

We think that the proposition here asserted is well sustained by the authorities, and the first question to be determined is whether, on account of the acts charged by plaintiff against the defendants, he would have had a cause of action against either of them if no conspiracy had been charged.

If he would have had, then he may maintain his action for a conspiracy. If he could not have sustained a separate action against

either of the defendants on account of the matters complained of, the additional charge of a conspiracy will not give it. *Cool. on Torts*, 125; *Kimball v. Harmon & Burch*; <sup>1</sup> *Laverty v. Vanarsdale*.<sup>2</sup>

The appellee also asserts the following proposition, which may be conceded to be correct: "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property."

The privilege here asserted must be limited however to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing. If without such motive the cause of one person's interference with the property or privileges of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party so long as no definite legal right of such third party is violated.

In the case of *Walker v. Cronin*, it was recognized to be a general principle that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing of such loss to another, without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong.

"There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

"Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right in such manner as he may see fit persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior

<sup>1</sup> 34 Md. 407.

<sup>2</sup> 65 Pa. St. 507.

right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Plaintiff's petition goes further than to charge that each of the defendants refused to sell to him. It charges that they not only did that, but that they induced a third person to refuse to sell to him. It does not appear from the petition that their interference with the business of plaintiff was done to serve some legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him.

We think the petition stated a cause of action and that the demurrer should have been overruled.

The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

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SEWALL L. HEYWOOD v. DAVIS TILLSON.

IN THE SUPREME JUDICIAL COURT, MAINE, MAY 29, 1883.

[*Reported in 75 Maine Reports, 225.*]

APPLETON, C. J.<sup>1</sup> This is an action on the case. The plaintiff in his writ alleges that on December 19, 1875, he was seized of a dwelling-house on Hurricane Island of great value, yielding an annual rent of one hundred dollars, which he should be receiving were it not for the wrongful act of the defendant, and ought to receive from one Charles H. Sanborn and other tenants; that he leased the dwelling-house and premises to said Sanborn for the term of one year, which sum said Sanborn was willing to pay; that the defendant was the occupant and owner of said Hurricane Island, and engaged in quarrying, cutting and working granite, and shipping the same to market; that there was no opportunity to lease any building, except to those in the defendant's employ; yet the defendant knowing this and to deprive the plaintiff of the rents and profits arising therefrom, did on December 29, 1875, order and direct the said Sanborn to pay him only twenty dollars a year, instead of ninety-six dollars, and threatened to discharge said Sanborn if he did not comply with his order; by means whereof the plaintiff received but one dollar and sixty-seven cents per month, instead of eight dollars; that afterwards, on August 1, 1876, said Tillson ordered and directed said Sanborn to leave said dwelling-house and refused to allow him to remain therein, and threatened to discharge him from his employment, unless he should leave said dwelling-house; and that the said Tillson threatened to discharge any and all persons from his employ-

<sup>1</sup> Only the opinion of the court is given. — ED.



ment, and expel them from the island, who should occupy said premises, and become tenants of the plaintiff, — by means of which orders, threats, and directions, the said Sanborn was induced to and did leave the premises, and refused to pay for the use of the same, and to occupy the same, — whereby the plaintiff has been unable to rent, lease, or sell said dwelling-house, and has lost all benefit from the same.

The second count is in trover for the conversion of the plaintiff's dwelling-house.

The evidence in support of the plaintiff's claim comes entirely from him, and witnesses called by him.

The defendant is the owner of Hurricane Island, has extensive quarries there, doing a large business, having important contracts with the government, and six hundred men in his employ.

The plaintiff went into the defendant's employ as a stone-cutter in 1873, and purchased the house referred to in the declaration, in the fall of 1874, for two hundred and fifty dollars, and was discharged in October, 1875. He testified that he "made no attempt to injure General Tillson, previous to his (my) discharge;" that he "had been taking notes in regard to the management of the job," and was "going to keep the notes in case the job was ever investigated;" that he "furnished information to the newspapers in regard to the management of the government works;" wrote articles in the "Boston Herald" and the "Rockland Opinion;" that when the latter paper was indicted for a libel growing out of the articles, he was here two weeks procuring witnesses for the publisher; that he said he considered the defendant a damned scoundrel, that he so testified on the trial of the indictment, and that he "so considers him now."

The house was built on defendant's land, by verbal permission of his clerk.

Such is the relation of the parties.

The plaintiff claims to recover in trover, but he testifies that General Tillson told him "that he would not interfere with making a disposition of the property," "that he has never directly assumed to him (me) any control over that house," "that he wanted me to dispose of my property there and go off the island; he said he should not interfere with my disposing of it," "that any man that rented my house should not work for him." Here is no conversion of the property. The plaintiff might live there. He might sell or lease his estate. He had full control of his property, leaving the defendant at liberty in fixing the terms and conditions on which he would employ those laboring for him. Whatever they might do, here is no conversion of the house of the plaintiff.

The first ground of complaint in the second count in the declaration is, that he "had leased the said dwelling-house and premises to the said Charles H. Sanborn for the term of one year from the said day hereinbefore specified (December 29, 1875), for the sum of eight dollars per month, which sum the said Charles H. Sanborn was then and there ready and willing to pay." "Yet the said defendant, well know-

ing the premises, . . . did on the said December 29, A. D. 1875, order and direct the said Charles H. Sanborn to pay the plaintiff only twenty dollars a year, instead of the ninety-six dollars per year, and threatened to discharge said Sanborn from his employment if he did not comply with such order; by means whereof the said Sanborn was prevented from payment to the plaintiff any more than one dollar and sixty-seven cents, instead of eight dollars per month."

The plaintiff's evidence disproves every material allegation as there set forth, and the above is the most tangible ground of complaint to be found in the whole declaration.

The house was not leased for the year. It was personal property. The plaintiff was not seized of it. Sanborn testifies that the plaintiff rented the house to him "for eight dollars a month, so long as he (I) saw fit to occupy it;" that he went into the house in October, 1875, and left in August, 1876, and that the amount he "paid Heywood was in the neighborhood of eighty dollars." The plaintiff nowhere alleges that he did not receive the rent as stipulated from Sanborn. The only evidence of ordering out is what is testified to by Sanborn; that "he said he did not wish to injure me (Sanborn), but the man that lived in Heywood's house could not work for him." But this constitutes no ordering. It was what he had a right to say. It did not interfere with letting to others.

As the house was rented to Sanborn by the month, as "*long as he saw fit to occupy it*," the contract was terminable at the option of Sanborn. He could terminate it when and for what reason he saw fit. The plaintiff could not complain of its termination, no matter how unreasonable it might be. He had no contract with Sanborn that he should remain. He might remain or not. In *Hutchins v. Hutchins* the defendants, after a will was made devising certain real estate to A, conspired to induce the testator to revoke it, and effected their object by means of false and fraudulent representations: *Held*, that A could not maintain an action, as the revocation of the will merely deprived him of an expected gratuity, without interfering with any of his *rights*. So, here, no rights were interfered with. There was no obligation on the tenant to remain. None on the landlord to permit him to remain. All there is, the tenant did not renew his contract. Why he did not is no concern of the landlord. The tenancy was at will. The exercise of that will was the exercise of a perfect right. The motive which induced that exercise can be no ground of complaint, whether it was the chance of bettering his condition, to gratify a whim of his own or the ill-will of another. The landlord cannot complain that a tenant declines to renew his lease. If Sanborn violated any contract, he is liable to the plaintiff in damages.

Besides, an employer has a vital interest in the welfare of his men. He has a right to see that they are not plundered. It was a perfectly proper motive for the defendant to interpose to prevent an extortionate rent, as that of one hundred dollars a year for a shanty costing but two

hundred and fifty dollars. His own interest and his interest in the success of his employ  s, without the imputation of anything sinister on his part, afford good and sufficient reasons for his intervention.

The question raised is, whether the defendant is liable in damages to a landlord for a tenant's leaving, or for one or many declining to become or not becoming tenants in consequence of his threats that he would employ no one who should become such landlord's tenants, or being his tenants should continue to remain such.

The defendant was doing a large business, having five or six hundred men in his employ. It was of the utmost importance to his success that his employ  s should be of good habits, friendly to his enterprise and interested in his prosperity. As between the employer and the employ  , each may fix the terms and conditions on which the one will employ and the other be employed. "It is well settled," observes Shaw, C. J., in *Com. v. Hunt*,<sup>1</sup> "every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." The employer has equal and reciprocal rights to fix the terms and conditions upon which alone he will contract for employment. He is restricted to no color or race. The conditions upon which he insists may be silly or absurd. If acceded to, they are binding on the employ  . Whether wise or not, if legal, it is no concern of others. In *Carew v. Rutherford*,<sup>2</sup> Chapman, C. J., uses this language: "Every man has a right to determine what branch of business he will pursue, and to make his contracts with whom he pleases and on what terms he can. . . . He may refuse to deal with any men or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." The employer has the same right of imposing conditions and limitations as those he may employ.

The workmen may agree that they will not work for an employer "who should, after notice, employ a journeyman who habitually used it" (liquor), *Com. v. Hunt*. A laborer would not be liable to a journeyman who lost employment by reason of such agreement, and the refusal of the employer any longer to hire him. So the master may equally impose as a condition that his servants shall not board at a house where liquors are kept for sale, and the seller cannot maintain an action against him for the loss of profits on liquors he might have sold his boarders had they remained with him. He may impose as a condition of employment, that certain associates and associations shall be avoided. Good habits are not all that is desirable. An interest in the success of an enterprise is required. The master may impose as a condition of employment, that he shall not associate with one who is inim-

<sup>1</sup> 4 Met. 133.

<sup>2</sup> 106 Mass. 14.

ical to him, — who is seeking to injure him, who is acting as a spy upon his proceedings, and who is libelling him in the newspapers.

So the employer, as he may by contract stipulate with his men where they shall not board, may equally determine where and of whom they may rent the houses they may occupy, and where they may not. The house may be in an unhealthy part of the city, or a disreputable neighborhood. But whatever the reason, good, bad, or indifferent, no one has a right to complain.

The owner has no cause of complaint when one says he will not occupy his house, nor when another says he will refrain from doing an act if it be occupied. The defendant was under no obligation, — owed no duty to the plaintiff that he should permit his men to occupy his house any more than to a boarding-house keeper, that he should permit his men to board with him. The idea of a boarding-house keeper suing a man because he declines or refuses to employ his boarders, or the owner of a house, because he will not employ his tenants, is utterly at variance with the right of individuals to make their own contracts. A landlord has no right of action against an employer of men, because he refuses to employ his tenants or boarders. Nor are his rights enlarged because the reason of such refusal is, that they are his tenants or boarders.

Neither is the employer liable if, having the tenants or boarders of a landlord in his employ, he discharges them from his service because they choose to remain such tenants or boarders, having the right by his contract with them to terminate their services. If he has not that right he may be liable to those so discharged. If he has, no one else has any right to complain, because an employer having a right to discharge a servant, does discharge him. The contract is between the master and servant, and the master is not obliged to retain his servant in his employ in such case, and no one else can bring a suit against him because he does not.

The defendant has broken no contract. He has made none with the plaintiff. If the plaintiff has none with any one, no contract is broken. If there be one, and the tenant has broken it, preferring to continue in the defendant's service, the tenant is liable for such breach. He is the one by whom the contract is broken. He is the principal in its breach. The defendant has done nothing.

It must be remembered that the interference complained of is not with the general rights of the plaintiff. The threat is not general. It is only as to his employés. The plaintiff may rent to all the rest of humanity. The defendant owes no duty to the plaintiff. He has done him no wrong by declining to employ his tenants, unless he was under some legal obligation to employ them, and was guilty of some wrong in not employing them. This very action is brought upon the assumption that the defendant was in some way under an obligation to employ the plaintiff's tenants; that he was guilty of a dereliction of duty, of a violation of the plaintiff's right, in not employing his tenants, or in threatening not to employ such as should become or were his tenants.

If the defendant had advised a tenant to leave, because the house was in a disorderly neighborhood or too distant from the place of labor, and he had left, it will not be pretended that an action could have been maintained. If he advises and urges him to leave, but fails, however malicious his motive, his malice affords no ground of action. If he procures him to leave without notice he is not responsible. There is no cause of action against him. But if the act, not actionable in itself, is accompanied by a bad motive, — affords a ground of action, — then it follows, that if an act be in itself lawful, if a bad motive becomes the basis of a suit, that is a man is sued for his motives, irrespective of his conduct.

The defendant had an absolute right to employ or not to employ, a tenant of the plaintiff, and no action would be maintained against him if he chose not to do it.

Threatening not to employ such tenant affords no ground of action on the part of the landlord. A threat to commit an injury is "not an actionable private wrong." Cooley on Torts, 29. It is only the promise of doing something which in the future may be injurious. It may never be carried into effect. It cannot be foreknown that it will be.

The belief on the part of the defendant that the plaintiff had injured and would injure him existing, that from ill-will thus arising, he said he would neither employ nor retain in his employ a tenant of the plaintiff, affords no ground of action. Having a right to make that a rule of action, he is not liable for so doing, still less for merely threatening.

The act legal, he cannot be sued for mere ill-will or personal animosity, especially when he has cause. "The exercise by one man of a legal right cannot be a legal wrong to another." Cooley on Torts, 685. In *Stevenson v. Newnham*,<sup>1</sup> it was held that an act which did not amount to a legal injury could not be actionable because done with a bad intent. The insertion of the word "maliciously," when the act complained of is not unlawful *per se*, will not make a count good which would be bad without it. *Cotterell v. Jones*.<sup>2</sup> Evidence that an act legal in its character was done wantonly and with intent to injure was held inadmissible in *Benjamin v. Wheeler*.<sup>3</sup> In *Randall v. Hazelton*, Colt, J., says, "Damages can never be recovered where they result from a lawful act of the defendant." The law will not inquire into the motives of the party exercising such right, however unfriendly or selfish. "It is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantage or cause a loss to him, without violating any legal right; that is," remarks Wells, J., in *Walker v. Cronin*, "the motive in such case is immaterial. *Frazier v. Brown*,<sup>4</sup> *Chatfield v. Wilson*, *Mahan v. Brown*, *Delhi v. Youmans*."<sup>5</sup> A similar decision was made in *Wheatley v. Baugh*.<sup>6</sup> If a wrongful

<sup>1</sup> 76 E. C. L. 281.

<sup>2</sup> 73 E. C. L. 713.

<sup>3</sup> 8 Gray, 409.

<sup>4</sup> 12 Ohio St. 294.

<sup>5</sup> 50 Barb. 316.

<sup>6</sup> 25 Penn. St. 528.

act would suffice, one would think that fraudulent representations by which one was prevented from securing his debt by an attachment would suffice, but it was held otherwise in *Bradley v. Fuller*.<sup>1</sup> "Malicious motives make a bad act worse; but," observes Black, J., in *Jenkins v. Fowler*, "they cannot make that wrong which in its own essence is lawful; . . . any transaction which would be lawful and proper if the parties are friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law, by doing no *act* which violates it, we must leave his motives to Him who searches the heart." In *Fowler v. Jenkins*<sup>2</sup> the preceding case is cited with approval, Woodward, J., remarking that "even a malicious exercise of this right would give the plaintiff no cause of action." In *Glendon v. Uhler*<sup>3</sup> the same doctrine was reaffirmed. In *Phelps v. Nowlen*, Miller, J., says "that the maxim, *Sic utere tuo ut non alienum lædas*, applies only to cases when the act complained of violates some right, and an act legal in itself, violating no right, cannot be made actionable upon the ground of the motive which induced it." "But motives," say the court in *Pickard v. Collins*,<sup>4</sup> "in doing an act which violates no legal right of another, cannot make that act a ground of action." In *South Royalton Bank v. Suffolk Bank*,<sup>5</sup> it was decided that an act lawful and right in itself is not actionable on account of its being performed from an improper or bad motive. "Motive alone," remarks Bennet, J., "is not enough to render the defendants liable for doing those acts which they had a right to do." This doctrine was reaffirmed in *Chatfield v. Wilson*. There is nothing conflicting with these decisions to be found in *Harwood v. Jones*.<sup>6</sup> In *Hunt v. Simonds*<sup>7</sup> it is held that an action does not lie for conspiring to do a lawful act, however malicious the motive, for the very obvious reason that the act was lawful. These views are fully sustained in the text-books. Cooley on Torts, 688; *Smith v. Bowler*; <sup>8</sup> *Kiff v. Youmans*.<sup>9</sup>

In most of the cases where reference is had to the motive as malicious, it will be found that the act done was wrongful, as in *Bowen v. Hall*, where a contract was broken. The breaking the contract was an unlawful act, and the inducing it was held to make the person liable,—as in the case of enticing a servant from his master; but if there be no contract, one is not liable for inducing a person to leave, though the master wished to further employ him. *Boston Glass Manufactory v. Binney*.<sup>10</sup> In other cases, malice is shown to enhance damages. But if the act be legal, one is not liable for doing it. If doing it from a bad motive, he be made liable, then his liability arises from his motive, and not from his act. A different rule would encourage litigation. "Malice," observes Miller, J., in *Phelps v. Nowlen*, "might be easily inferred from idle and loose declarations, and a wide door be opened

<sup>1</sup> 118 Mass. 239.<sup>2</sup> 23 Barb. 444.<sup>7</sup> 19 Missouri, 583.<sup>10</sup> 4 Pick. 425.<sup>2</sup> 28 Penn. 176.<sup>5</sup> 27 Vt. 505.<sup>8</sup> 2 Disney (Ohio), 153.<sup>3</sup> 75 Penn. 467.<sup>6</sup> 32 Vt. 724.<sup>9</sup> 86 N. Y. 324.

by such evidence, to deprive an owner of what the law regards as well-defined rights." This same act under the same circumstances would be a wrong, if done with intent to injure by one man, and if done by another without such intent, would be regarded as fitting and proper. A tort implies a wrongful act done. But mutual ill-will between parties antagonistic to each, affords no basis for mutual suits for such ill-will. "So in reference to the term damage, the law is," remarks Colt, J., in *Randall v. Hazelton*, "that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*." But a refusal to hire or to continue to retain one in his employ because he boards with one inimical to the employer, does not give a right of action for such refusal, unless there is some rule of law restricting the employer in the terms and conditions of his employment.

To entitle a plaintiff to recover, there must be a wrong done. "No one is a wrong-doer but he who does what the law does not allow."<sup>1</sup> He who does what the law allows cannot be a wrong-doer, whatever his motive. "So no one is guilty of a fraud, because he exerts his rights."<sup>2</sup> The motive which may induce such exertion is immaterial.

So far as relates to the case of Sanborn, who was a tenant by the month, the stipulated rent was fully paid, and the tenant left as he had a right to do. He left because defendant would not employ one of the plaintiff's tenants. The defendant had a right to impose that condition. The tenant had a right to his preference.

As to the rest of the world, except the defendant's employés, there was full liberty of sale or rent. As to these, there was liberty, if they chose to risk the chance of employment. The defendant threatened. He might cease to threaten. He might never carry his threats in execution. He might never intend to. There is no proof that a single one of his employés was influenced by his threats — wanted to hire plaintiff's house, or would have hired it; or hiring it, would have remained; or remaining, how long any tenant would have remained.

There is no proof of any wrong done, — of any legal damage, — or of any facts for or on account of which any damages could be assessed, — unless threatening to do what a man has a perfect right to do will constitute a sufficient foundation for an action. If any wrong was done, it was by the tenant in leaving; and if he has broken any contract, or violated any rights of the plaintiff, he alone is responsible for his misfeasance.

*Plaintiff nonsuit.*<sup>3</sup>

<sup>1</sup> *Nemo damnum facit nisi quid id fecit quod facere jus non habet.* — Dig. xii. 6, 53.

<sup>2</sup> *Nullus videtur dolo facere qui suo jure utitur.*

<sup>3</sup> *Payne v. Western Co.*, 13 Lea. 507 *Accord.*

See *Roger v. Dutt*, 13 Moo. P. C. 209. — Ed.

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For an instructive discussion of the topics covered by this chapter, see Professor Wignmore's Essays, "The Boycott as Ground for Damages," 21 Am. L. Rev. 509, and "Interference with Social Relations," 21 Am. L. Rev. 764. — Ed.

SECTION II. (*continued*).

(d) BY MAINTENANCE.

## HARRIS v. BRISCO.

IN THE COURT OF APPEAL, JUNE 11, 1886.

[*Reported in Law Reports, 17 Queen's Bench Division, 504.*]

FRY, L. J., delivered the judgment of the court (Lord Esher, M. R., and Bowen and Fry, L. JJ.) as follows: <sup>1</sup>—

This is an appeal from a judgment of Wills, J., by which the plaintiff recovered from the defendant Brisco a sum of £118, and costs.

The action was one for maintenance, and the short facts are these:

One William Nailer and his brother Charles Nailer were owners in fee in equal moieties of a small farm. This had been mortgaged for £1,000. Charles Nailer sold to the plaintiff Harris his equity of redemption in his moiety for £25. William Nailer obtained advances from Harris. Harris took an assignment of the mortgage for £1,000, and subsequently purchased from William Nailer his equity of redemption in his moiety for £40. Harris allowed William Nailer for a time to occupy the farm, and then turned him out. Nailer considered himself aggrieved, and brought an action in the Chancery Division against Harris for the redemption of the farm. In this action Nailer was aided and abetted by Brisco. Harris set up the assignment of the equity of redemption, and thereupon Nailer by amendment denied that he had executed any conveyance of his equity of redemption, and alleged that, if he had executed any such conveyance, his execution was procured by fraud. This action was tried before Kay, J., when the plaintiff Nailer entirely failed, and his action was dismissed, with costs to be paid by Nailer. Harris's costs were taxed at the sum of £113 0s. 4d., which sum, Nailer being a pauper, has never been paid. Harris has brought the present action to recover this sum of £113 0s. 4d., together with £5 for personal costs, from Brisco, as having maintained Nailer in his redemption action. Wills, J., has held that the plaintiff has proved his case, and from his judgment the defendant Brisco has appealed.

On this appeal many points have been urged.

The defendant's counsel have, in the first place, contended that no such action will lie. On principle this contention appears untenable, for maintenance is an unlawful act, and, when an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to such person a remedy by action against the wrongdoer. But it is hardly necessary to resort to principle, for the point is well covered by authority.

<sup>1</sup> Only the opinion of the court is given. — Ed.



The law writers of the age of Elizabeth refer to the action in question as a well-known one. Theloall, in his *Digest des Briefes* (lib. 2, cap. 12, fo. 59), states a case in which three plaintiffs may be joined in a brief in maintenance, and Rastall, in his *Entrees* under the head "Maintenance," gives a form of a count in such an action. Lord Coke, 2 Inst. 208, is equally clear. "An action of maintenance did lie at the common law," he says, in commenting on the Statute of Westminster the First, which on this point was declaratory of the common law. Comyns's *Digest* (title Maintenance, c. 1) is to the like effect. *Les Termes de la Ley*, p. 422, after defining maintenance, adds: "The party grieved shall have against him" (that is, the wrong-doer) "a writ, called a writ of maintenance." Lord Loughborough, in 1797, in *Wallis v. Duke of Portland*,<sup>1</sup> in like manner declared that such an action would lie at common law. In *Pechell v. Watson* the Court of Exchequer seem to have entertained no doubt as to the existence of such an action; and, lastly, in *Bradlaugh v. Newdegate*,<sup>2</sup> Lord Coleridge, C. J., upheld the action. In the face of this long chain of authorities the defendant's argument on this point is utterly untenable.

In the next place, the defendant alleges that he aided and maintained Nailer out of charity, and that charity is an answer to an action of maintenance. Now the facts of the case, as found by Wills, J., appear to us to be shortly, that the defendant Brisco aided Nailer out of charity, and because he believed him to be oppressed by Harris, but that in fact Nailer was not oppressed by Harris, and had no cause of action against him, and that Brisco took no reasonable pains to make inquiry into the real facts of the case, or to ascertain those facts, and that, if he had acted as a reasonable man, he would never have aided Nailer in an action, and thereby put Harris not only to the anxiety and trouble of being defendant in the action, but to the loss of his costs from the poverty of Nailer; and Wills, J., has held, as a matter of law, that the mere desire to benefit Nailer is not a defence to the present action, "unless the defendant had some reasonable ground for his belief that he was furthering the cause of justice and supporting the oppressed against the oppressor."

To the view taken by Wills, J., of the facts we entirely assent, but upon these facts two questions of law arise which have been argued before us, viz. : First, Is charity a defence to an action for maintenance? Secondly, Is thoughtless and inconsiderate kindness towards a particular person charity within the meaning of the defence, if such defence there be?

The doctrine that charity is an excuse for maintenance seems first to have found expression in our law in the case of *Rothewel v. Pewer*,<sup>3</sup> in the course of which Martin, Justice of the Common Pleas, said: "I can give gold or silver to a man that is poor to maintain his plea, if he

<sup>1</sup> 3 Ves. 502.<sup>2</sup> 11 Q. B. D. 1.<sup>3</sup> Y. B. 9 Hen. 6, p. 64.

himself cannot through his poverty : this is not maintenance against the law ; " and in *Power or Pomeroy v. Abbot of Buckfast*,<sup>1</sup> Paston, a judge of the Common Pleas, said :<sup>2</sup> " Suppose that I of my charity give a sum of money to a poor man who has a suit, in order to aid him in the suit ; it is no maintenance : no more is it in the case at the bar. Again, in 22 Hen. 6, p. 35, Prisot, Serjeant, who appears to have been counsel in the case, observed " that in writ of maintenance it is a good plea that he who is supposed to have been maintained is a poor man, and had no means to defend himself in the suit which the plaintiff had against him, and that the said new defendant of his alms gave him 20s., which is the same maintenance alleged."

These authorities found, as might be expected, their place in the Abridgments of Brooke and Rolle, and the result of them appears in Hawkins's Pleas of the Crown, 8th ed., vol. i., p. 460, in the statement that " it seems to be agreed that any one may lawfully give money to a poor man to enable him to carry on his suit," and in Blackstone's Commentaries, vol. iv., p. 134, in the words, " A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor out of charity and compassion with impunity." Similar statements are to be found in Viner's and Bacon's Abridgments, tit. " Maintenance."

It is, no doubt, remarkable that no case can be found in our law books in which the defence of charity has been actually raised to a proceeding for maintenance. But the proposition that charity is a good defence was asserted by the judges as well-known and understood law more than four hundred years ago, when the law of maintenance was more familiar than it is now, and it has been adopted and accepted by the compilers of the digests to which we are accustomed to look for guidance, and upon this proposition no judge, counsel, or writer has, so far as we can learn, thrown any doubt. We hold that the proposition is part of the law of England.

But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word " charity " by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor, as well as of the supposed victim, and shall act only after due inquiry and upon reasonable and probable cause. If we were making new law and not declaring old law it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.? — a view which even now is present to the minds only of a select few, and does not commend itself to a large proportion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet, appears/

<sup>1</sup> Y. B. 21 Hen. 6, p. 15.

<sup>2</sup> Y. B. 21 Hen. 6, p. 16.

to us without foundation in law. Of this limitation on the word "charity" no trace can be found in any of the authorities which have been cited, and, furthermore, in the other exceptions to the law of maintenance, such as those arising from the relations between lord and tenant, master and servant, neighbor and neighbor, there appears, so far as we can learn, to be no case or dictum in the books in which the duty of making inquiry, or of acting only on reasonable and probable grounds, has been recognized as a limitation of the right of giving assistance.

For these reasons, but not without regret, we differ from Wills, J., and think that his judgment must be reversed, and the action dismissed with costs here and below.

*Appeal allowed.*

## CHAPTER VI.

MALICIOUS INJURY TO THE PLAINTIFF BY MEANS OF  
A TORT TO A THIRD PERSON.

## THE MIDLAND INSURANCE CO. v. SMITH AND WIFE.

IN THE QUEEN'S BENCH DIVISION, MARCH 23, 1881.

*[Reported in Law Reports, 6 Queen's Bench Division, 561.]*

WATKIN WILLIAMS, J.<sup>1</sup> This action is one of an extraordinary, and so far as I am aware of an unprecedented, character. The questions of law involved in the case, which was argued before me yesterday, arise upon demurrer to the statement of claim, and I now proceed to give judgment.

The facts, which for the purposes of the argument are assumed to be true, are as follows: The plaintiffs, an insurance company, granted to the defendant, Charles Smith, a policy of fire insurance, dated the 26th of June, 1880, by which they agreed with him that if certain property in a certain house should be destroyed or damaged by fire they would pay or make good all such loss or damage during the currency of the policy. The defendant Mary, the wife of the defendant Charles Smith, having been left by him in charge of the house and property insured did, with the malicious intention of destroying the insured property and of injuring the insurance company and of creating a claim upon the policy, wilfully set fire to and destroy the house and the insured property. Charles Smith, the assured, then made a claim upon the policy against the company. The company thereupon brought this present action against Smith and his wife, to recover damages for the loss which the company alleged they had sustained or might sustain through the wrongful and felonious act of the defendant Mary, if the defendant Charles made good his claim upon his policy.

I was informed in the course of the argument, although these facts do not appear formally before me, that the defendant Charles had, before this present action, brought an action against the company upon the policy to recover the amount of his loss, and that in that action the company disputed their liability on the ground that the loss, having been caused by the arson of the wife, was not covered by the policy, and that they had also set up a counter-claim for damages against Smith and his wife, who was brought in as a party to the action upon the same ground; that that action went down to trial, and that the learned judge, before whom the cause came on for trial,

<sup>1</sup> Only the opinion of the court is given. — ED.

adjourned the proceedings in order to enable the company to test the validity in law of their contention in a separate and distinct manner before proceeding to try the question of arson. The present action was then commenced. The questions, however, for determination in this action must depend exclusively upon the facts set forth in the statement of claim, and the issues of law raised by the demurrer.

The company in support of their case started with the general principle that "every husband is liable for the wrongful acts of his wife," and that as the defendant Mary had wrongfully injured and destroyed the insured property, and had caused the damage upon which a claim upon the policy had been based, they, as the insurers of the property, had a right to sue her and her husband for the damage and injury so done by her, and not the less so because the husband happened to be himself the assured whom they had agreed to indemnify. In substance, the contention of the company came to this, that they ought not to be called upon to pay the assured the amount claimed, without being entitled concurrently to claim damages from him for the loss caused by the act of his wife, for which he is answerable.

The defendants, by their demurrer to this claim, raised two main issues of law. In the first place they said that the company were not in a position to maintain any action for the alleged damage done to the goods, because they were not the owners of the goods, nor had they sufficient interest therein to entitle them to maintain an action; that their only right as insurers would be to avail themselves of such rights and remedies as were vested in their assured, after they had admitted his claim and been subrogated to his rights in relation to the subject of insurance; and that, even if they had been subrogated to the rights of the assured, they could only sue in his name and could not maintain an action in their own name, and therefore that no such action could be maintained in the present case, because the assured had no right of action against his own wife.

In the next place the defendants contended that this action being based upon an act, which on the face of the statement of claim amounted to a felony, could not be maintained, because it was not shown that the rights of the public law had been vindicated by a prosecution of the felon.<sup>1</sup>

Upon the first ground of demurrer the defendants are, in my judgment, clearly entitled to judgment both upon principle and upon authority. It appears to me that the insurance company have no right of action under the circumstances for the damage done to the goods by the defendant Mary. At the time when the damage was done to the goods the company had no property or interest in the goods sufficient to sustain any action for damage done to them; no right or interest in the goods could accrue to the insurance company, until they had

<sup>1</sup> The opinion of the court on this point is omitted. The defendants' contention was not sustained. — Ed.

acknowledged the claim under the policy, and by so doing entitled themselves to the benefit of any claims and causes of action vested in the assured; but it seems that even up to this moment the insurance company dispute the claim and deny the right of the assured to demand an indemnity under the policy. But, further, it seems to me equally clear that, if they had done everything to entitle themselves to the benefit of such a claim, it could only be enforced in the name of the assured and for the purpose of enforcing his rights, and inasmuch as he could have no such claim or right against his wife, it follows that in no possible view of the case is the plaintiffs' claim sustainable. The case of *Simpson v. Burrell*<sup>1</sup> is in point upon this question. In that case Burrell was the owner of two ships, one of which negligently ran down and sank the other with a valuable cargo. Burrell's underwriters upon the sunken ship paid him for a total loss, and were so subrogated to all his rights. A claim was made by the owners of the cargo in the sunken ship against Burrell, as the owner of the ship in fault, for the value of their goods, and Burrell, as the owner of the ship in fault, paid into court the whole value of that ship at £8 per ton, as the limit of his liability under the Merchant Shipping Acts, to be ratably divided among all who had sustained loss and damage by the ship being negligently run down and sunk; thereupon Burrell's underwriters upon the sunken ship who had paid for a total loss claimed to come in and share with the rest the money paid in by the ship in fault; but the House of Lords, reversing the decision of the Lords of Session in Scotland, decided that they had no such right, and the reasoning in that case is directly applicable to the present. The Lord Chancellor Cairns said, "The view of the Lord President therefore appears to be that, after payment by the underwriters as on a total loss, there is effected by some independent operation of law a transfer of whatever, if anything, can be recovered in specie of the thing insured — and by reason of the transfer of the thing insured an independent right in the underwriters to maintain in their own name, and without reference to the person assured, an action for the damage to the thing insured which was the cause of the loss. I am not aware of any authority for the view of the case thus taken. I know of no foundation for the right of the underwriters, except the well-known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Lord Penzance said: "The learned counsel for the underwriters contended that they, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract, and that

<sup>1</sup> 3 App. Cas. 279.

this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this, — that where damage is done by a wrongdoer to a chattel, not only the owner of the chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation. This, I say, is the principle involved in the respondent's contention. If it be a sound one, it would seem to follow that if by the negligence of a wrongdoer goods are destroyed, which the owner of them had bound himself by contract to supply to a third person, this person, as well as the owner, has a right of action for any loss inflicted upon him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of the attendance and medicine cast upon him by the accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer, bound for a term to a manager of a theatre, is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relations is daily created by contract, might be both numerous and novel." See, also, the cases of *Randal v. Cockran*,<sup>1</sup> *North of England Insurance Association v. Armstrong*,<sup>2</sup> *Stewart v. Greenock Marine Insurance Co.*,<sup>3</sup> *Davidson v. Case*,<sup>4</sup> *Mason v. Sainsbury*,<sup>5</sup> *Yates v. Whyte*.<sup>6</sup>

This action cannot therefore in my judgment be maintained, nor is there any substantial injustice in such a result, because, as it seems to me, the insurance company are in this dilemma; the loss and damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against; now, if it is such a loss, an attempt by the company to enforce against the husband a return indemnity or reimbursement is at variance with the very

<sup>1</sup> 1 Ves. Sen. 97.

<sup>2</sup> 2 H. L. C. 159.

<sup>5</sup> 3 Douglas, 61.

<sup>2</sup> Law Rep. 5 Q. B. 244.

<sup>4</sup> 8 Price, 542. \*

<sup>6</sup> 4 Bing. N. C. 272.

substance of their undertaking to indemnify him ; if, on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses covered by the policy, then this action is as wholly misconceived, unnecessary, and unfounded, as if the loss had been caused by any other risk not covered by the policy. The truth is that the real and substantial contention on the part of the insurance company is, that the loss in question having been caused by the wilful act of the wife of the assured, although acting without the privity of her husband, is not a loss covered or insured against by the policy. That question might be raised in the action brought by the assured against the company upon the policy, but it does not arise, and indeed could not be raised, so as to receive a binding and judicial determination, in such an action as the present. As however the question has been fully and ably argued before me, and as the parties have expressed a desire to elicit an opinion upon the point, I have no hesitation in saying that it appears to me to be upon principle perfectly clear and free from doubt that such a loss would be covered by an ordinary policy against loss caused by fire ; under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself or some one acting with his privity and consent. In order to escape from responsibility for such a loss as the present the company ought to introduce into their policy an express exception.

*Judgment for the defendants.*



## CHAPTER VII.

MALICIOUS USE OF ONE'S OWN PROPERTY IN ORDER TO  
INJURE THE PLAINTIFF.

## MAHAN v. BROWN.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1835.

[Reported in 13 Wendell, 261.]

THIS was an *action on the case*, tried at the Albany Circuit in September, 1833, before the Hon. James Vanderpoel, one of the circuit judges.

The suit was brought for the *obstruction of lights* in the dwelling-house of the plaintiff by the wanton and malicious erection of a fence fifty feet high, without benefit to the defendant, but for the sole purpose of annoying the plaintiff.

On the trial of the cause, the counsel for the plaintiff, in his opening to the jury, stated that the dwelling-house of the plaintiff was built on a lot adjoining the lot of the defendant; that a recess was cut into the side of the house adjoining the lot of the defendant, in which windows were placed for the admission of light and air; that the defendant, under the pretence of preventing his yard from being overlooked by the windows in the plaintiff's house, but in fact from *mere malice* and with the intent to exclude the light and air from the windows in question, had erected on his own lot a fence forty feet high, opposite the recess or opening in the house of the plaintiff, in consequence whereof the light and air had been excluded from the windows, and the plaintiff had sustained great damage, by her apartments which had been occupied by boarders being rendered untenable. The counsel admitted that the *upper* windows in the house of the plaintiff did overlook the yard of the defendant, but that a fence had been erected by the plaintiff twenty feet high, to prevent the defendant's yard being overlooked from the *lower* windows. He also admitted that the plaintiff did not claim that the windows were *ancient lights*, or that a right had been acquired by her, by *grant or occupation and acquiescence*. On this opening, the counsel for the defendant moved that the plaintiff be *nonsuited*, inasmuch as it was not proposed to prove that she had a right or title to the privileges complained to have been destroyed; which motion was granted by the judge, and the plaintiff was accordingly nonsuited. A motion was now made that the nonsuit be set aside, and a new trial granted.

*S. Stevens*, for the plaintiff.

*A. Taber*, for the defendant.

*By the Court, SAVAGE, Ch. J.* That an action upon the case lies for stopping the *ancient lights* of another is too well settled to require discussion or authority to support it. Formerly, indeed, it was holden that the lights must be ancient and beyond the memory of man. And in the case of *Bury v. Pope*,<sup>1</sup> it was agreed by all the justices that where two own adjacent lands, and one builds and makes windows looking on the lands of the other, and continues for 30 or 40 years, yet the other may lawfully erect on his own soil an house or other thing against said lights, without being liable to an action; for it was the folly of the first to build his house so near the other's land. And the maxim is quoted, *cujus est solum, ejus est summitas usque ad coelum*. Now, however, it is perfectly settled, that as the occupant may acquire a right to the house itself by 20 years' uninterrupted possession under claim of title, so in the same time he shall by occupation acquire a right to an easement belonging to the house. *Yelv. 216; 2 Saund. 175, a, b, c.* It is true that 20 years' possession does not strictly confer a right absolutely, but it raises a presumption of a grant. *2 Barn. & Cress. 686.* The person who thus opens a window overlooking the privacy of his neighbor, enjoys an easement in that which does not belong to him. Yet no action lies for this encroachment upon the rights of the person whose lands are thus overlooked; the encroachment will in 20 years ripen into a right, and it is said that the only remedy is to build on the adjoining land opposite to the offensive window. *3 Campb. 80.*

The present is not a case of ancient lights. It is not contended that the action can be sustained upon that ground, but upon the principle that no one shall so use his own property as to injure another. Thus, no man has a right to erect upon his own land, near the house of another, any manufactory which shall poison the air and render it unwholesome. So in *Morley v. Pragnell*,<sup>2</sup> an action was held to lie by an innkeeper against the defendant for erecting a tallow furnace, which annoyed his house with stench, by reason of which his guests left him, and his family became unhealthful. So in *Aldreds's Case*,<sup>3</sup> the plaintiff brought an action against Burton, the defendant, for erecting a hog-house and putting his hogs therein; and by reason of the fetid smells the plaintiff and his family could not remain in his house. The plaintiff recovered. The defendant moved in arrest of judgment, that one ought not to have so delicate a nose that he cannot bear the smell of hogs, for they are necessary to the food of man; but it was resolved that the action lay. In these cases, however, it is to be observed that a positive right was invaded. Every person is entitled to the use of the elements in their natural purity, and whoever poisons them or renders them unhealthy, violates that right. The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do; although it is said no action lies for it. He is therefore encroaching, though not strictly and legally trespassing upon

<sup>1</sup> Cro. Eliz. 118.<sup>2</sup> Cro. Car. 510.<sup>3</sup> 9 Co. 48.

the rights of another. He enjoys an easement therefore in his neighbor's property, which in time may ripen into a right.<sup>1</sup> But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. Suppose an obliging farmer permits his neighbor to pass and repass through his fields, to go to the lands of that neighbor; if this is permitted for 20 years, it becomes an easement, a right of way, which the owner of the soil cannot infringe; but at the end of ten years, he chooses, from mere malice or wantonness, to shut up this passage, and refuses permission to his neighbor to pass over his lands, as he used to do for ten years past; does an action lie? Most certainly not. And yet that case is not distinguishable, in principle, from that under consideration. The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint.

*The motion to set aside the nonsuit denied.*<sup>2</sup>

### LEON RIDEOUT v. DAVID KNOX AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 4, 1889.

[Reported in 148 Massachusetts Reports, 368.]

TORT against David Knox and Elizabeth E. Knox, his wife. The action was based on chapter 348 of the Statutes of the year 1887.<sup>3</sup>

<sup>1</sup> The law in this country is against the acquisition of such an easement by lapse of time. *Guest v Reynold*, 68 Ill. 478; *Parker v. Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537. — ED.

<sup>2</sup> *Auburn Co. v. Douglas*, 9 N. Y. 447, 450 (*semble*); *Pickard v. Collins*, 23 Barb. 444 *Accord*.

But see *Thurston v. Hancock*, 12 Mass. 220, 226, 227. — ED.

<sup>3</sup> This statute, entitled "An Act in relation to fences and other structures erected to annoy, and for the abatement of nuisances," and "Approved June 2, 1887," is as follows: —

"Section 1. Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Section 2. Any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby, and the provisions of chapter one hundred and eighty of the Public Statutes concerning actions for private nuisances shall be applicable thereto."

At the trial in the Superior Court, before Lathrop, J., the evidence showed that the plaintiff and the defendants were the occupants of adjoining estates on Johnson Street in Lynn; that the structure complained of, which was about seventy-five feet long and eleven feet high, and composed of slats set into posts, was erected in November, 1886, on the order of Mrs. Knox, with the concurrence and assent of her husband, on her land, against the fence which stood on the line dividing the estates of the parties; that the structure was about two and a half feet from some of the windows of the plaintiff's house, and about six inches from one window, the lower part of which was of ground glass.

David Knox testified that the structure in question was erected as a trellis on which to trail vines, and not for the purpose of injuring the plaintiff in the comfort or enjoyment of his estate.

The defendants asked the judge to rule:—

“1. That the plaintiff had no action, as chapter 348 of the Acts of the year 1887 was unconstitutional.

“2. That the structure must be erected for the sole purpose of annoyance; even if a motive to annoy existed, if it was inferior to a motive of use or adornment of the defendants' estate, and if there was a *bona fide* use of the structure, beneficial to the defendants, the plaintiff cannot recover.”

The judge declined to give the first ruling requested, but ruled that the statute was constitutional; defined the terms “maliciously” and “unnecessarily;” and gave other instructions appropriate to the case.

As to the second request for instructions, the judge, after instructing the jury that the plaintiff must prove that the structure was maliciously maintained for the purpose of annoying the plaintiff, and that “annoying” meant “injuring” the plaintiff, either in his comfort or the enjoyment of his estate, instructed the jury as follows: “The defendants say the structure was not put up for any such purpose; that it was put up for a perfectly legitimate purpose, namely, as a trellis on which to train vines. If you believe that that was the sole purpose for which the structure was put up, then the plaintiff has not made out his case. But if the defendants had in mind in maintaining the structure, or if it was their intention in maintaining it, not only to use it for the purpose of training vines, but also for the purpose of injuring the plaintiff, either in his comfort or in the enjoyment of his estate, then the plaintiff has made out that part of his case.”

The jury returned a verdict for the plaintiff for the sum of one cent; and the defendants alleged exceptions.<sup>1</sup>

*J. R. Baldwin*, for the defendants.

*W. H. Niles* and *G. J. Carr*, for the plaintiff.

HOLMES, J. This is an action of tort, under the Statute of 1887, c. 348. The plaintiff has had a verdict for nominal damages, and the first question raised by the bill of exceptions is the constitutionality of the

<sup>1</sup> The case is somewhat abridged. — Ed.

statute. Another question more or less connected with the former is whether the structure, in order to bring it within the act, must be erected or maintained for the purpose of annoyance as the dominant motive, or whether it is enough if that purpose existed, although subordinate to a *bona fide* use for legitimate purposes.

At common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. *Walker v. Cronin*; *Chatfield v. Wilson*; *Phelps v. Nowlen*; *Frazier v. Brown*; <sup>1</sup> *Martin, B., in Rawstron v. Taylor*.<sup>2</sup> See *Benjamin v. Wheeler*.<sup>3</sup>

But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities, that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. *Greenleaf v. Francis*.<sup>4</sup> See *Carson v. Western Railroad*; <sup>5</sup> *Roath v. Driscoll*; <sup>6</sup> *Wheatley v. Baugh*; <sup>7</sup> *Swett v. Cutts*.<sup>8</sup>

We do not so understand the common law, and we concede further, that to a large extent the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation. It may be assumed that, under our Constitution, the Legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree: most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain. *Sawyer v. Davis*.<sup>9</sup>

The statute is confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is

<sup>1</sup> 12 Ohio St. 294.

<sup>4</sup> 18 Pick. 117, 121, 122.

<sup>7</sup> 25 Penn. St. 528.

<sup>2</sup> 11 Exch. 369, 378, 384.

<sup>5</sup> 8 Gray, 423, 424.

<sup>8</sup> 50 N. H. 439, 447.

<sup>3</sup> 8 Gray, 409, 413.

<sup>6</sup> 20 Conn. 533, 544.

<sup>9</sup> 136 Mass. 239, 243.

not denied, when any convenience of the owner would be served by building higher. It is at least doubtful whether the act applies to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief. *Commonwealth v. Walden*.<sup>1</sup> See *Commonwealth v. Goodwin*.<sup>2</sup>

Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive, — a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently.

We are of opinion that the statute thus construed is within the limits of the police power, and is constitutional, so far as it regulates the subsequent erection of fences. To that extent, it simply restrains a noxious use of the owner's premises, and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. See *Commonwealth v. Alger*;<sup>3</sup> *Watertown v. Mayo*;<sup>4</sup> *Train v. Boston Disinfecting Co.*<sup>5</sup> See also *Talbot v. Hudson*.<sup>6</sup>

Whether the statute is constitutional with reference to fences already in existence when the act was passed, is a more difficult question.<sup>7</sup>

*Exceptions sustained.*

## JAMES FALLOON v. ADAM SCHILLING.

IN THE SUPREME COURT, KANSAS, JANUARY, 1883.

[Reported in 29 Kansas Reports, 292.]

The opinion of the court was delivered by

BREWER, J.<sup>8</sup> This was an action of injunction brought by plaintiff in error, plaintiff below, in the district court of Brown County. On the

<sup>1</sup> 3 Cush. 558.

<sup>2</sup> 122 Mass. 19, 35.

<sup>3</sup> 7 Cush. 53, 86, 96.

<sup>4</sup> 109 Mass. 315.

<sup>5</sup> 144 Mass. 523.

<sup>6</sup> 16 Gray, 417, 423.

<sup>7</sup> The court answered this question in the affirmative. — Ed.

<sup>8</sup> Only the opinion of the court is given.

trial of the case, after the plaintiff had finished his evidence, a demurrer thereto was sustained, and judgment entered for the defendant. The facts as stated in the petition are, that defendant was the owner of a tract of eighty acres adjoining the town of Hiawatha. Out of this tract he conveyed three fourths of an acre to one Oscar Spalsbury, which last-named tract by sundry conveyances passed to and became the property of plaintiff. It was his homestead. His family consisted of himself, wife, and two boys, aged respectively six and one years. Plaintiff's dwelling-house is located within thirteen feet of the east line of his lot, and has three windows opening on that side. The town of Hiawatha has been growing rapidly for the last few years, and there is quite a demand for town lots. The eighty-acre tract, which as alleged was once wholly owned by defendant, is eligibly situated for the purposes of an addition to the town of Hiawatha, and defendant was anxious to lay off the entire eighty acres as such an addition. He offered plaintiff \$1,600 for his property, which was refused, the same being reasonably worth \$1,900 or \$2,000. Thereupon defendant conceived the oppressive and unlawful idea of rendering plaintiff's home obnoxious and unendurable to himself and family, by erecting cheap tenement houses on either side of plaintiff's land, and filling them with worthless negroes that they might annoy plaintiff's wife, who is a person in delicate health, and thereby punish plaintiff for refusing defendant's inadequate offer for the property. In pursuance of this purpose, defendant started to build one of these tenement houses directly on the line of plaintiff's land, and thus distant only thirteen feet from plaintiff's house. Upon these facts the petition prays for an injunction restraining the defendant from erecting such buildings. Defendant answered this petition by general and special denials. The case was called for trial, and from the plaintiff's testimony the ownership of the land appeared as alleged; also, the occupation of plaintiff's land by himself as a homestead, the efforts of defendant to purchase plaintiff's property, defendant's expressed intention of erecting small houses close to plaintiff's land and renting them to negroes to annoy plaintiff's family and enforce him to accept the offer, and also defendant's statement that he would make plaintiff sorry for refusing the offer, and that when he had forced plaintiff out of his homestead, he would move away the buildings. In pursuance of this intention, he erected a small building about twenty feet by twelve feet, placing it within four feet of plaintiff's land. It was without cellar or foundation walls, and so constructed that it could be removed without injury. It was a house of two rooms, was painted, and of itself looked neat, and would rent for some five or six dollars a month. When completed, it was rented to a colored preacher, who occupied it with his family, consisting of himself, wife, and one child. This family behaved well. Such was the substance of the testimony. Plaintiff's complaint was, that defendant built this house close to his home and put this family into it for the purpose of annoying plaintiff, and not for the purpose of improving his own property. We have

stated the allegations of the petition and the substance of plaintiff's testimony at length, in order that the full ground of plaintiff's complaint may be perceived. Stated briefly it is, that defendant, the owner of adjacent lands, provoked at plaintiff because of his refusal to sell at his terms, and for the sake of annoying plaintiff and his family, erected small tenement houses close to plaintiff's land, and rented them to negroes. Do these facts entitle him to an injunction? Plaintiff invokes the familiar maxim, "*Sic utere tuo ut alienum non lædas*," and insists that under that he is entitled to the injunction prayed for. It will be perceived that plaintiff's complaint is twofold: first, as to the kind of buildings that defendant is erecting; and second, the uses to which he intends putting them. He complains that defendant is erecting small shanties, and that he proposes filling them with worthless negroes. His testimony fails to fully sustain his allegations. It is true the building defendant has erected is a small tenement house of but two rooms, without cellar or foundation walls, and yet the plaintiff himself says the building looks neat. The building is rented to a negro family, but that family is the family of a preacher, and well behaved. It cannot therefore be said that defendant is filling his buildings with *worthless* negroes. Now does the fact that defendant is improving his property with small tenement houses — houses which do not compare favorably with plaintiff's homestead — and that he is renting those houses to negro families, give plaintiff a right to interfere by an injunction simply on the ground that defendant is so acting for the purpose of annoying plaintiff? We think not. Doubtless a party may obtain an injunction to restrain a neighbor from erecting or continuing on his premises a nuisance, but that as a general rule is the limit of interference. A man has a right to improve his own property in any way he sees fit, providing the improvement is not such a one as the law will pronounce a nuisance, and this he may do although he make such improvement through spite. And it may be laid down as a universal rule, that the size and quality of the improvement never of themselves constitute it a nuisance. A land-owner may erect upon his land the smallest or most temporary kind of dwelling-house or store in close proximity to the finest mansion or block of buildings, and that for the mere sake of spiting the owner of such mansion or block of buildings by the contrast, without becoming subject to restraint at the hands of the courts. In other words, if the improvement itself is legitimate and lawful, is not, *per se*, a nuisance, the law will not inquire into the motives with which he acts. It is true the law will interfere to prevent the erection of a nuisance such as a stable, out-building, &c., but not to prevent the erection of a store, tenement, or anything of that nature. Even where the building may or not become a nuisance, according to the manner in which it is used, the erection of the building will not be restrained. High, in his work on Injunctions, section 488, says: —

"Where the injury complained of is not, *per se*, a nuisance, but may or may not become so, according to circumstances, and where it is un-



certain, indefinite or contingent, or productive of only possible injury, equity will not interfere. Thus, the erection of a wharf, a railroad bridge, a planing-mill, a livery stable, or a turpentine distillery, will not be enjoined where the injury is only a possible and contingent one."

And in support thereof cites several authorities. Again, in section 496, the author states :—

"It is no ground for interference that the erection of the alleged nuisance would prevent the use of surrounding property for such buildings as, in the ordinary course of affairs and the extension of a city, would be erected, nor that it would increase the rate of insurance on surrounding buildings."

Of course, these tenements houses, though small, would when rented bring income to the defendant, and although he might have means to erect larger buildings and thus obtain a higher income, the size of the buildings is a matter for his judgment alone to determine. Again, even after buildings which are in themselves perfectly legitimate and proper are erected, they may be put to uses which are illegitimate and improper, which will constitute them nuisances and justify the interference of a court of equity. Thus, if dwelling-houses are used as houses of ill-fame, a court of equity will restrain such use. But the interference will be only to enjoin the use and not to destroy the buildings. But equity will not interfere simply because the occupants of such house are by reason of race, color, or habits, disagreeable or offensive. A negro family is not, *per se*, a nuisance, and a white man cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish, or a French family. The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as that neighbor's family is well-behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts. We think, therefore, that neither the size nor character of the building erected, nor the use to which it is put, justified any interference on the part of the courts. The defendant used this property for his own benefit in a legitimate way, created no nuisance, and, though he may have acted with the utmost spite against the plaintiff, yet so long as he keeps within the limits of legal action, the courts will not interfere. We have examined the various cases cited by plaintiff, and see none directly in point, or that will sustain his cause of action. The case of *Harbison v. White*<sup>1</sup> was decided under a local statute attempting certain police regulations. But even that does not conflict with this decision. The other cases are cases in which the acts enjoined were of themselves nuisances. We find no case in which a party seeking to place an improvement upon his own land, an improvement which will increase his income, which improvement is not a nuisance, which does not endanger the physical health or comfort of his neighbor, is restrained

<sup>1</sup> 46 Conn. 106.

from such improvement on the ground that it is annoying and disagreeable to such neighbor, that it does not correspond in character and kind with the improvements on such neighbor's premises, that it would bring a different class of people socially into immediate proximity to his neighbor, and that all this was done and intended through spite against such neighbor. We think, therefore, the judgment of the district court was right, and it must be affirmed; and it is so ordered.

All the justices concurring.

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### JENKINS v. FOWLER.

IN THE SUPREME COURT, PENNSYLVANIA, 1855.

[Reported in 24 Pennsylvania Reports, 308.]

ERROR to the Common Pleas of Bradford County.

This was an action on the case by Lewis D. Fowler v. George Jenkins, for removing a fence, by which injury was sustained by the plaintiff.

Fowler and Jenkins owned lands adjoining each other, the division line running east and west. A public road had been laid out on the division line through their unimproved land. Subsequently each party cleared off his land to the road, and put in a crop of wheat, and in the spring following each one built a fence to secure his crop, the fences meeting at the centre of the road, and obstructing it. It did not appear from the evidence brought up that the road had been opened when the fence was removed. A witness testified that he was one of the commissioners when the road was laid out. He added: "After we were there, and laid out the road, there was no act of any commissioner, to my knowledge, by way of opening the road. I think it was not cleared out or opened on the side of the hill where it was laid until after the crop of wheat was taken off."

After Jenkins had his wheat taken in, and after Fowler had commenced to cut his wheat, a part of the fence was removed by Jenkins, and cattle got into the field. For the injury caused by them the action was brought.

On part of the defendant the court was, *inter alia*, asked, *secondly*, to charge, that if the parties by agreement or otherwise built their fences so as to meet in the centre of the highway, either of them might at any time remove the part of the fence put up by him in the highway, and that the other party had no right of action for injury to his crops by cattle of others coming upon his land over the part of the highway from which the fence had been removed.

Wilmot, J., charged that the "road was laid by authority, and dedicated to the public use, and the fence was an illegal obstruction." That the second point was correct with the qualification, that if the

defendant threw down the fence out of motives of malice towards the plaintiff — that he acted from a wicked and wanton purpose to do the plaintiff an injury, the action could be sustained.

Verdict for plaintiff for \$8.

Error was assigned to the portion of the charge referred to.

*Mercur* and *Elwell*, for plaintiff in error.

*Baird*, for defendant in error.<sup>1</sup>

The opinion of the court was delivered by

BLACK, J. These parties were the owners of adjoining lands, and a public road was laid out and opened on the division line which at that time ran through the woods. Afterwards the land was cleared, and crops sowed on both sides. To save labor and expense, the parties agreed not to make a lane along the road, but to enclose the fields on both sides by a ring fence, each one maintaining it to the middle of the woodland, stopping it up.

Undoubtedly this contract was illegal and void. It was an agreement to commit a nuisance for which both of the parties were liable to an indictment. If any citizen had asserted the public right to the use of the road by throwing down the fence, those who put it up could have sustained no action for the injury suffered by them. The contract being wholly void, one of the parties cannot sue the other for the breach of it.

When the defendant got his own crop away, he threw down that part of the fence which he had placed on the road, and thus caused the plaintiff's grain to be destroyed by the cattle which were let in upon it. The Court of Common Pleas rightly instructed the jury on the nature of the contract, and said in substance that it was of no validity; but added, that if the defendant acted from motives of malice, or with the wicked and wanton intent to do the plaintiff an injury, then the action could be sustained. We think this was erroneous. The defendant took down a fence which he was not bound by any lawful contract to keep up; which he could not maintain except in defiance of law, and in the teeth of the public right; and the plaintiff could not legally demand that it should be kept up, for he had no property in it, and no binding contract in relation to it. In such a case we cannot take cognizance of mere feelings and motives. These considerations may and do often aggravate the character of wrongs. Malicious motives make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat the justification. One who prosecutes another for a crime, need not show in an action for malicious prosecution that he was actuated by correct feelings, if he can prove that there was good reason to believe

<sup>1</sup> The arguments of counsel are omitted. — Ed.

the charge well founded. In short, any transaction which would be lawful and proper if the parties were friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motives to Him who searches the heart.

*Judgment reversed, and venire facias de novo awarded.*<sup>1</sup>

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LEWIS CHATFIELD v. WALTER M. WILSON.

IN THE SUPREME COURT, VERMONT, NOVEMBER TERM, 1855.

[Reported in 28 Vermont Reports, 49.]

BENNETT, J.<sup>2</sup> This is the first time, within my knowledge, that the question has ever come before our courts, in relation to the rights of adjoining proprietors of lands to water percolating under the surface, through wet and porous ground, and the case may be considered somewhat important in principle, as well as novel, in this State. The court below, on this point, told the jury, in substance, that the defendant had the right to prevent the escape of water from his own land to the plaintiff's tub, which he had sunk on his own land, and that he might lawfully do all that was necessary to restore the water to its original flow, and that it was not material what his motive was; and that he had the right, on his own land, to prevent the natural flow or escape of water, in or under ground, from his to the plaintiff's land, provided it was done to secure, in a reasonable manner, a supply of water for himself, his farm, and cattle; but if done solely to injure the plaintiff, and deprive him of water, and not to benefit himself, then he would be liable. This charge is evidently based upon the ground that there were certain correlative rights existing between these parties, in the use of the water percolating in and under the surface of the earth. The rules of law which govern the use of a stream of water, flowing in its natural course over the surface of lands belonging to different proprietors, are well settled, and the correlative rights of the adjoining proprietors are clearly defined. Each proprietor of the land has the right to have the stream flow in its natural course over his land, and to use the same as he pleases for his own purposes, not inconsistent with a similar right in the proprietors of the land above or below him; but no proprietor above can diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any proprietor below throw back the water upon the proprietor above, without some license or grant. But we think the law governing running streams is not applicable to underground water, and that no light can be obtained from the law of surface streams.

<sup>1</sup> See *Jenkins v Fowler*, 28 Pa. 176, 178. — ED.

<sup>2</sup> Only the opinion of the court is given, and that, too, is somewhat abridged. — ED.

We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

In the case of *Acton v. Blundell et al.*,<sup>1</sup> it was held that the owner of land, who had made a well in it, and thereby enjoyed the benefit of underground water, had no right of action against an adjoining proprietor who, in sinking for and getting coal from his own soil, in the usual and in a proper manner, caused the well to become dry. A query is added whether it would have made any difference if the well had been enjoyed by the plaintiff for more than twenty years. In the case of *Roath v. Driscoll*,<sup>2</sup> the doctrine is fully advanced that no right is gained by a mere continued preoccupation of water under the surface by any artificial means for a period of fifteen years or more. The court say, "Each owner has an equal and complete right to the use of his land and to the water which is in it;" and they say, "The water combined with the earth, or passing through it by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself, any more than the metallic oxyds, of which the earth is composed;" and they further add, "Water, whether moving or motionless, in the earth, is not, in the eye of the law, distinct from the earth." If it is true that subterranean water is to be treated as a part of the earth, it must follow that there are no correlative rights in the enjoyment of such water, between adjoining proprietors of land, and both the case in the 12th of M. & W. and 20 Conn. proceed upon that ground. The case of *Greenleaf v. Francis*<sup>3</sup> goes upon the same principle, and it was there held that no action would lie against a man who dug a well on his own land, although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant, or an adverse user. The case is really put upon the ground that "every one has the liberty of doing, on his own ground, whatever he pleases, even though he occasion some damage to his neighbor;" and the court say, "There is nothing in the case, then at bar, which limited or restrained the owners of the estates severally from having the absolute dominion of the soil extending upwards, and below the surface, as far as each pleased." This, in effect, negates the position that there can be, upon common principles, correlative rights in underground water.

The tub was sunk by the plaintiff on his own land, in 1852, and as his evidence tended to prove, a foot or more below the channel of the brook, and that, from this tub, the water was taken by artificial means for the use of the plaintiff; and the case shows that the plaintiff's evidence tended to prove that this tub was supplied with water, which filtrated under ground from the brook, and also from the adjoining land

<sup>1</sup> 12 M. & W. 324.

<sup>2</sup> 20 Conn. 533.

<sup>3</sup> 18 Pick. 117.

of the defendant; and the case, so far as it is sent up to us, only concerns the right of the defendant to cut off the filtration of the water from his own land to the plaintiff's tub by artificial means, and the consequences, if wantonly done.

This, then, is fairly a question as to the rights of the plaintiff in underground water. Putting this case, then, upon the ground that the water in question, while in the earth of the defendant, though percolating through it, is not distinct from it, in the eye of the law it becomes an important inquiry whether the act of the defendant, in the obstruction of the underground water upon his own premises, can be made actionable, simply upon the ground that the motive was bad which induced it. The act of the defendant in the obstruction of the water, being in itself lawful, could not subject the defendant to damages unless, by reason thereof, some right of the plaintiff has been violated. The maxim, *Sic utere tuo, ut alienum non lœdas*, applies only to cases where the act complained of violates some legal right of the party; and it has been attempted to be shown that this underground water cannot be made the subject of correlative rights. It is said in Comyn's Digest, under the head of Nuisance, that an action on the case does not lie for the reasonable use of any right, though it be to the annoyance of another. This, it may be said, implies that an action would lie if the use of one's right was unreasonable.

This, no doubt, is true, under proper limitations, as in cases where there is a right common to both parties, as in the use of a public highway, or of the air; or where there is a duty to perform, and a correlative right growing out of it, as the repair of a ruinous house standing so near to the house of another as to endanger it from its fall. In such a case, no doubt, a repair could be compelled; and, in case of the fall, an action would lie for the special damage. There are also many cases in the books, relating to the relative use of surface streams, where the case has turned upon the question whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are correlative rights to the use of the water, and the boundary of the right is a reasonable use of it. But such cases have no analogy to the case at bar, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it. Such was the case of *South Royalton Bank v. Suffolk Bank*.<sup>1</sup> If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*. On this point the case of *Mahan v. Brown* is a direct authority. There the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house; and it was held that no action would lie, where the lights were not ancient, and no right had been acquired by grant or user; and that the motive with which the act was done was immaterial.

<sup>1</sup> 27 Vt. 505.

This case goes upon the ground that the plaintiff was not injured in a legal right.

This is not like the case where the air is contaminated so as to become noxious. There a correlative right is invaded. In the case of *Greenleaf v. Francis*,<sup>1</sup> it is true; the court charged the jury that if the defendant dug the well where he did, upon his own land for the purpose of injuring the plaintiff, and not for the purpose of obtaining the water for his own use, the defendant was liable in that action. In that case, the verdict was for the defendant, and the plaintiff was the excepting party. The plaintiff could not complain of that part of the charge; and, in bank, there was no occasion to review that part of it; and it is no point in the decision, though Judge Putnam does remark, in the course of his opinion, that "the rights of the defendant should not be exercised from mere malice as the judge ruled below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar, and the one now before us, the position was unsound, and against principle and authority.

*Judgment of the county court reversed, and the cause remanded.*<sup>2</sup>

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O. D. PHELPS, APPELLANT, v. G. H. NOWLEN, RESPONDENT.

IN THE COURT OF APPEALS, JANUARY, 1878.

[Reported in 72 *New York Reports*, 39.]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon a decision of the court at special term.

This action was brought to recover damages for the alleged malicious acts of the defendant in drawing off water from plaintiff's well, and to enjoin the commission of further similar acts.

The court found substantially the following facts: The parties were the owners of adjoining premises in the village of Avon. Upon defendant's land was a mineral spring, around which an embankment had been formed, partly by the action of the water and partly artificial, which raised the water in the spring. In September, 1872, plaintiff dug a well upon his land, which struck a vein of mineral water, which rose in the well to within thirteen feet of the surface; plaintiff conducted water from the well to a bath-house and a fountain by means of a pipe laid in the ground, which entered the well about three and a half feet

<sup>1</sup> 18 Pick. 117.

<sup>2</sup> See *Harwood v. Benton*, 32 Vt. 724, 736, 737. — ED.

below the surface of the water, and gave an abundant supply of water. Defendant, aware of the operations and constructions of plaintiff, and soon after the completion thereof, dug a ditch through the embankment around his spring, lowering the water about five feet. There appeared to be some subterranean communication between plaintiff's well and defendant's spring, and soon after the digging of the ditch, and in consequence thereof, the water in the well was lowered so that the surface of the water fell below the opening of the pipe, and the supply of water to plaintiff's bath-house and fountain was cut off, and plaintiff suffered damage to a large amount.

The court also found as follows: "That when the defendant dug his ditch, as above stated, he supposed that the water in the plaintiff's well communicated in some hidden and undefined way with the water in his spring; that he expected the lowering of the spring would be followed by a diversion of sub-surface water from the well, and a consequent depression of the surface of the water in the well; that he intended to produce that result; that he dug the ditch for that purpose and no other, and that in so far as such intent and purpose, under the circumstances above found, can constitute malice, his motive was malicious."

As conclusions of law, the court found: "That the defendant had an absolute right to dig the ditch and lower the spring on his own land, as above stated, and that with whatever motive he acted, he invaded no legal right of the plaintiff in so doing. That the plaintiff had no right to have the said spring maintained at any given height upon the defendant's land for his benefit or convenience. That the diversion of sub-surface water from the plaintiff's well in consequence of the lowering of the defendant's spring, and the hurtful effects which resulted to the plaintiff from such diversion, as above stated, do not constitute a legal injury, and are not the subjects of legal redress." And, therefore, that the plaintiff was not entitled to the relief demanded in the complaint.

*George F. Danforth*, for appellant.

*J. C. Cochrane*, for respondent.<sup>1</sup>

MILLER, J. The act of the defendant in digging a ditch through the mound which had been formed around the spring on his land, and which had raised the surface of the water therein, was *prima facie* lawful, and a proper exercise of his right, as the owner of the land, to the enjoyment of the subterranean waters which flowed under the same. The effect of the embankment was to raise the water in the well, which had been constructed upon the land of the plaintiff, higher than it naturally would have been, and the plaintiff had no right, by prescription or otherwise, to have it maintained by the defendant at that elevation.

The use of the water, as thus increased, was only enjoyed by the plaintiff by the mere permission or license of the defendant, which

<sup>1</sup> The arguments of counsel are omitted. — ED.



the latter could revoke at his pleasure. *Babcock v. Utter*,<sup>1</sup> *Mumford v. Whitney*,<sup>2</sup> *Clinton v. Myers*.<sup>3</sup> The defendant was authorized to restore the water to its natural course for any legitimate and proper purpose, and to this extent, at least, was justified in opening the mound and removing any obstacle to the natural and ordinary flow of the water. That the effect of lowering the surface of the defendant's spring was to cause a diversion of water from the plaintiff's well, and to prevent that full supply which otherwise, and but for the defendant's act, would have been furnished, could not interfere with the exercise of the defendant's right to control the water on his own land.

The object of the defendant in digging the ditch, according to the finding of the judge, was not to lower the water for his own benefit and advantage, but with the intent to produce a diversion of the water from the plaintiff's well; and, in so far as such intent and purpose, under the circumstances, can constitute malice, his motive was malicious. The question arises, then, whether the defendant is liable for the consequences of an act done upon his own land, lawful in itself, because he was influenced by a motive which is alleged to be wrong, and the object was to prevent the use of water by an adjoining owner, which he would not have enjoyed but for the mound upon the land of the defendant. The right of an owner of land to a free and uninterrupted use of the same is absolute and complete, so long as he does not infringe upon the rights of his neighbors. And as a result of this well-settled principle, such owner is also entitled to the enjoyment and use of all springs hidden beneath the surface of the soil, and flowing therein by means of subterranean and unknown channels, for all legitimate and proper purposes. In the case at bar, the plaintiff was enjoying the use of water which had been provided by the embankment on defendant's land, and the act of the defendant merely restored the water thus temporarily retained, to its previous natural course. It is not by any means clear that the assertion of a lawful right on one's own land, even although it is not designed to benefit the party who seeks to maintain it, and may injure an adjoining owner, constitutes legal malice for which a remedy by action exists. Strictly speaking, such an act is but a vindication of what the law sanctions, and, of itself, furnishes no just ground for complaint. It may have been lawfully done by the defendant, to prevent a diversion of water, the use of which he claimed, and which if allowed to continue, by lapse of time, might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent cannot well be considered as malicious, or the purpose a wrongful one.

That it proves injurious to another, is more the fault of the party who reaps a benefit from that which does not belong to him, than of

<sup>1</sup> 32 How. 439.

<sup>2</sup> 15 Wend. 380.

<sup>3</sup> 46 N. Y. 511.

the one who was originally entitled to it, and is only claiming his just rights. While the law does not allow an owner to erect on his own land, near the house of another, structures for carrying on an unwholesome and obnoxious trade, which may poison the air, and constitute a nuisance that interferes with a proper enjoyment of the property of an adjoining owner, and does not permit a person, in any form, to disturb a legitimate use of another's property, it also does not interpose its shield for the protection of such owner in what does not actually belong to him. If the exercise of a lawful right can be regarded as malicious and wilful, then the obstruction of lights of a neighbor which are not ancient, and not entitled to protection for that reason, might be considered as a ground for the interposition of the courts, and the revocation of a temporary license to pass over the lands of another as unauthorized. The motive, be it what it may in such a case, can have no effect, and does not prevent the assertion of the right of the real owner. *Mahan v. Brown*.

There are cases in this State besides the one last cited, which sustain the principle that a party is not debarred from the vindication of a legal right because he is actuated by an improper motive. In *Pickard v. Collins*,<sup>1</sup> it was held that the injury arising by the use of one's own land to another's property must be a legal injury; an invasion of some legal right, as erecting a building, or carrying on a business which so obstructs the enjoyment of another of his property, as to amount to a nuisance, or removing the soil or placing something on the soil of another, and that the liability of the defendant does not depend upon the *motives* with which the erection was made. It was said that the fallacy of a contrary doctrine which was contended for, "consists in its overlooking a fatal defect in a right of action in such a case, the absence of any legal injury. Bad motives in doing an act which violates no legal right of another cannot make that act a ground of action." The case of *Mahan v. Brown* is reviewed at length and approved in the case last cited. In *Clinton v. Myers*,<sup>2</sup> the action was brought to restrain the defendant, the owner of the land upon the stream below, from opening the gate of plaintiff's dam and letting off the accumulated waters, he claiming a right to do so, and it was held that it was immaterial that the defendant insisted upon his right to the natural flow of the water in the stream from a bad motive and for the purpose of annoying the plaintiff, and that a court has no power to deny a party his legal right, because it disapproves his motives for insisting upon it. These cases tend to establish the doctrine in this State, that if a man has a legal right courts will not inquire into the motive by which he is actuated in enforcing the same. A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. An idle threat to do what is perfectly lawful, or declara-

<sup>1</sup> 23 Barb. 444.<sup>2</sup> 46 N. Y. 511.

tions which assert the intentions of the owner might often be construed as evincing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights. I have been unable to discover any decision in this State which is in conflict with the views stated.

In *Panton v. Holland*,<sup>1</sup> some remarks are made as to acts, lawful in themselves, which became actionable if done with malice. That case was an action against an owner of adjoining lands, who, while digging for a lawful purpose on his own land, caused an injury to his neighbor's house, and is not in point. The doctrine laid down in the opinion in *The Trustees of Delhi v. Youmans*<sup>2</sup> is *obiter*, and is not upheld by the authorities relied upon. The principle discussed is also supported by other cases. In *Chatfield v. Wilson*, the defendant placed within his own land, and near the line of the plaintiff's land dry hard earth which prevented the plaintiff from availing himself of the water which had before percolated into the plaintiff's land, and supplied a reservoir placed therein from which the water had been drawn and used by him, and it was held that the act being lawful of itself could not subject the defendant to damages, unless by reason thereof some right of the defendant had been violated. That the maxim, *Sic utere tuo ut alienum non lædas*, applies only to cases where the act complained of violates some right, and an act legal in itself violating no right cannot be made actionable upon the ground of the motive which induced it. This case goes further than is required in order to sustain the defence here. See, also, *South Royalton Bank v. Suffolk Bank*,<sup>3</sup> which upheld the same rule as to the motive. In a subsequent case, *Harwood v. Benton*,<sup>4</sup> the court refer to the decision in *Chatfield v. Wilson* in respect to excluding a wanton and improper motive as an element on the ground of the defendant's liability, remarking that in the present case there is no imputation of such motive, but express no opinion thereon while they indorse the main point "as a sound exposition and application of the law."

There are cases in other States where language is employed which, it is claimed, upholds the doctrine that an act lawful in itself may be made unlawful, because the party who does it is actuated by malice. *Wheatly v. Baugh*,<sup>5</sup> *Roath v. Driscoll*,<sup>6</sup> *Carson v. W. R. R. Co.*,<sup>7</sup> *Howland v. Vincent*,<sup>8</sup> *Parker v. B. & M. R. R. Co.*,<sup>9</sup> *Greenleaf v. Francis*.<sup>10</sup> The remark of the court in *Greenleaf v. Francis*, that the rights of the defendant should not be exercised from mere malice, are referred to in *Chatfield v. Wilson*; and it is said that, as applied to that case, or the one then at bar, "The position was unsound and against principle and authority." Without considering the cases last cited at length, it is enough to say

<sup>1</sup> 17 J. R. 92.<sup>2</sup> 50 Barb. 320.<sup>3</sup> 27 Vt. 505.<sup>4</sup> 32 Vt. 737.<sup>5</sup> 25 Penn. 528.<sup>6</sup> 20 Conn. 533.<sup>7</sup> 8 Gray, 423.<sup>8</sup> 10 Metcalf, 373.<sup>9</sup> 3 Cush. 114.<sup>10</sup> 18 Pick. 117, 122.

that they are not directly in point, and none of them, we think, go far enough to sustain the right of the plaintiff, in the case at bar, to the relief sought, under the circumstances here presented. Some English cases are also relied upon as sustaining the doctrine contended for by the plaintiff's counsel. In a leading decision (*Acton v. Blundell*<sup>1</sup>), the defendant found and sunk a coal mine on his own land, the effect of which was to cut off the under-ground veins and currents which supplied the plaintiff's well, and to prevent his operating his mill. It was held that there was a marked and substantial difference between the law as to the right to enjoy the under-ground spring of water, and that by which a water-course flowing on the ground is governed; that the case does not fall within the rule which obtains as to surface springs, and in analogy therewith, and that the person who owns the surface may dig therein and apply all that is there found according to his own free-will and pleasure; and if, in the exercise of such right, he intercepts or drains off the water collected from under-ground springs in his neighbor's well, this inconvenience falls within the description of *damnum absque injuria*, which cannot be the ground of an action. In the head-note of the case, it is stated that the owner, in carrying on the mining operations in the *usual manner*, drained away the water. The civil law, as stated by Marcellus, was cited, and Maule, J., translated the original text as meaning that "if a man digs a well in his own field, and thereby drains his neighbor's, he may do so, unless he does it maliciously." It will be seen that there was no question in the case last cited as to the motive of the defendant, and that point was not distinctly passed upon, nor do we think it necessary to determine the question here; but, even if the doctrine of the civil law, as defined, might apply to a case where a man deliberately and with malice pre-pense set to work to drain off and destroy his neighbor's well, yet, giving to the rule stated full force and effect, it is quite obvious that it has no application to the present case.

In *Chasemore v. Richards*,<sup>2</sup> it is laid down that the owner of land has a right to the enjoyment of the land and to the underground waters upon it, and he may, in order to obtain that water, sink a well, but that he ought to exercise such right in a reasonable manner and with as little injury to his neighbors' rights as may be, and it is said that "the civil law deems an act otherwise lawful in itself illegal if done with a malicious intent of injuring a neighbor, *animo vicino nocendi*." So, also, it is said in some of the reported cases, that the owner of land may be liable when he uses his land as an instrument of injury or malice, or is actuated by a malicious intent.

The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another. But not a single case

<sup>1</sup> 12 M & W. 338.

<sup>2</sup> 7 House of Lords Cases, 387.

is cited which sustains the doctrine that the owner of land cannot assert a legal right, while, as we have seen, there is considerable authority in a contrary direction, as well as the *dicta* of some of the most learned and able judges.

It is said by Mr. Angell, "The question has been raised and discussed, in several of the cases cited, whether a land-owner, who, by acts done upon his own ground, has intercepted underground waters, and prevented them from percolating into another land-owner's well, or has actually abstracted water from such well, will be liable therefor in consequence of being actuated in his operations by *malicious motives*. It will be observed, however, that in no one of these cases has a land-owner been held liable for such acts in any court of last resort merely on this ground." Angell on Water-courses (6th ed.), § 114, p. 188. Washburn, in his work on Easements (3d ed., p. 475), also says: "The presence or absence of malice, as a criterion of liability for digging in one's own field, is clearly stated in the civil law, and has been assumed as essential in determining similar questions at common law. But if one has a legal right to do certain acts in regard to his own property, it is difficult to imagine how he should forfeit those rights by doing them from unfriendly motives towards the party who is affected by them." The learned author cites from 8 Gray, 410, where the court says that, "if the defendant had authority and acted within the scope of it, he is not a trespasser because his motives or purposes, with regard to the plaintiff, were unkind or malicious."

The result of the examination of the subject is that neither upon principle nor authority was the defendant liable for doing a lawful act upon his own premises. In this aspect of the case, it is not necessary to determine whether, under a different state of facts, the motive or intent or the malice of the owner of the land should be taken into consideration.

For the reasons given, the judgment should be affirmed.

All concur, except EARL, J., dissenting; CHURCH, Ch. J., and ALLEN, J., absent.

*Judgment affirmed.*

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### ALONZO F. CHESLEY v. BRADBURY F. KING.

IN THE SUPREME JUDICIAL COURT, MAINE, NOVEMBER 29, 1882.

[Reported in 74 Maine Reports, 164.]

BARROWS, J.<sup>1</sup> Damages were claimed by the plaintiff for the digging a well in the defendant's land above the plaintiff's spring with the malicious intent of cutting off the sources of supply from said spring, the result of which was that it became dry and useless.

We regard it as settled law in this State that any one may, for the

<sup>1</sup> Only the opinion of the court is given, and that is somewhat abridged.—ED.

convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages, although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well or spring of his neighbor. The reasons of the rule have been heretofore so fully discussed that we have no occasion in this connection to do more than cite some of the authorities. Chase v. Silverstone;<sup>1</sup> Greenleaf v. Francis;<sup>2</sup> Acton v. Blundell;<sup>3</sup> Broadbent v. Ramsbotham;<sup>4</sup> Chasemore v. Richards;<sup>5</sup> Wheatley v. Baugh;<sup>6</sup> Ellis v. Duncan;<sup>7</sup> Delhi v. Youmans;<sup>8</sup> Radcliff's Ex'rs v. Mayor, &c.;<sup>9</sup> Roath v. Driscoll;<sup>10</sup> and numerous other cases.

Seeing it is settled that this injury of which the plaintiff complains, is, in ordinary cases, where the owner of the adjacent land exercises his paramount right in good faith for his own or the public convenience or advantage, merely *damnum absque injuria* and no proper foundation for an action, the next inquiry is, whether it becomes a good cause of action where the proprietor of the land makes his excavations not for the purpose of accommodating or benefiting himself or others, but merely to do a damage to his neighbor who has some qualified rights in the spring. There is a conflict of authority either in decisions or *dicta* upon this point, — some courts of high standing, notably those of New York, Pennsylvania and Vermont, having said in some of their cases broadly, in substance, as in Glendon Iron Co. v. Uhler,<sup>11</sup> that “the commission of a lawful act does not become actionable, although it may proceed from a malicious motive.”

In view of the very numerous cases where “the commission of a lawful act *does* become actionable” by reason of the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another and without any design to secure a benefit to its doer or others, is not actionable when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done may combine the necessary elements of a tort, “an actual or legal damage to the plaintiff and a wrongful act committed by the defendant,” — or in other words may be an invasion of the legal rights of another accompanied by damages. One of the legal rights of every one in a civilized community would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred. We think there is more unexceptionable truth in the statement of the general principle in Com. Dig. Action on the Case, A: “In all cases where a man has a temporal loss or damage by the wrong of another, he may have an

<sup>1</sup> 62 Maine, 175.<sup>2</sup> 18 Pick. 117.<sup>3</sup> 12 Mees. & Wels. 335.<sup>4</sup> 11 Exch. 602.<sup>5</sup> 7 H. L. Cases, 349.<sup>6</sup> 25 Penn. St. 528.<sup>7</sup> 21 Barb. 230.<sup>8</sup> 50 Barb. 316.<sup>9</sup> 4 Comstock, 200.<sup>10</sup> 20 Conn. 533.<sup>11</sup> 75 Penn. St. 467.

action upon the case to be repaired in damages;" and in the remark of the court in *Walker v. Cronin*, thereupon: "The intentional causing of such loss to another without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong."

At all events it is worth while to examine the cases which are cited in support of the proposition above quoted from *Glendon Iron Co. v. Uhler*, to see how far the decision rests upon this doctrine, and how far upon other matters.

We think it will be found in most, if not all of them, the case was well disposed of, either on the ground that the plaintiff had not the right or property which he claimed in the subject of the injury, or that the defendant's acts might well be regarded as done not from the sole desire to inflict damage upon his neighbor, but partly at least from a justifiable, perhaps laudable design, to promote his own advantage or that of others, or protect his own property from subjection to some servitude by doing acts which, as between himself and the plaintiff, he lawfully might do,—or because for reasons of public policy the plaintiff was precluded from asserting an act to be maliciously done which was within the scope of the defendant's authority or right, and might well be referred to legitimate motives.

The particular case of *Glendon Iron Co. v. Uhler*, *ubi supra*, seems really to have turned upon the point that plaintiffs could have no exclusive right to use a mere geographical appellation as a trademark, and that the defendant actually manufacturing the same article at the same place was equally entitled to consult his own advantage by using the same name as a trademark. Where the plaintiff had no property to protect, it is perhaps not strange that the court should refuse to go into an inquiry as to the defendant's motives in doing an act which could not constitute an injury. That there was an admixture of what the law regards as a malicious motive for the defendant's act with other indifferent or laudable designs, could not be expected to confer a right of property on the plaintiff which he did not before possess. The case most relied upon to support the doctrine seems to be *Phelps v. Nowlen*, and as it approaches the case at bar perhaps as nearly in its facts as any other citation on the same side, it should receive careful examination. It presents the case of the withdrawal of a favor which the plaintiff had previously received from defendant in the maintenance of an embankment around a spring on defendant's land, which embankment raised the water in the plaintiff's well. The defendant dug through the embankment with the knowledge that such digging would diminish the water in the plaintiff's well and with the intention to do it; and the case finds "that in so far as such intent and purpose under the circumstances above found can constitute malice, his motive was malicious." But it is difficult to see how the simple withdrawal of a favor which has conferred no vested right to its continuance, can constitute actionable malice. While the court, undoubtedly, *arguendo*, refer approvingly to the doctrine under consideration as laid down very

broadly in the cases cited, it is noticeable that it adverts with satisfaction to the probable existence of a lawful motive, thus: "It may have been lawfully done by the defendant to prevent a diversion of water, the use of which he claimed, and which, if allowed to continue, by lapse of time might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent *cannot* well be considered as malicious, or the purpose a wrongful one. That it proves injurious to another is more the fault of the party who reaps a benefit from that which does not belong to him, than of the one who was originally entitled to it and is only claiming his just rights." In further discussion of cited cases, the learned court also advert to the doctrine imported from the civil into the common law, as stated in *Acton v. Blundell* and *Chasemore v. Richards*, *ubi supra*, and remark thereon, "The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another." Certainly the support given by this case to the doctrine contended for is somewhat equivocal, and the case seems really to have turned upon the want of any right in the plaintiff, and the probability of lawful and not (properly speaking) malicious motives in the defendant. The same elements are obvious in other cases cited to maintain this questionable dogma.

Thus in *Auburn Plank Road Co. v. Douglass*,<sup>1</sup> the court seem to have held that, in a case of the dedication of his land by a man to the public for use as a way, they would not inquire into his motives, at the instance of the corporation with a charter right to take toll, who alleged malicious injury. The motive might have been charitable and the court apparently would not repress benevolence or public spirit by such an inquiry into its motives. But upon the same facts it was held that equity would restrain the dedicator from keeping his road open in such a way as to enable those who travelled on the plank road to avoid the toll-gate.<sup>2</sup>

We see no reason why a man should maintain an action against an underwriter or an insurance company for refusing to contract to insure his property because he has injected into his declaration an allegation that the refusal was malicious. Neither law nor equity could compel them to insure the property of those with whom they did not choose to contract. There is a plain lack of right in the plaintiff, and the proposed inquiry into motives is immaterial. *Hunt v. Simonds*.<sup>3</sup>

The general doctrine of *Walker v. Cronin* is not what counsel claim, but rather that while a man has no right to protection against competition, he "has a right to be free from malicious and wanton interference, disturbance and annoyance." The *dictum* in *Walker v. Cronin*, adverse to this same doctrine as it was shadowed forth in *Greenleaf v. Francis*,<sup>4</sup>

<sup>1</sup> 5 Selden, 444.

<sup>2</sup> 12 Barb. 553.

<sup>3</sup> 19 Missouri, 583.

<sup>4</sup> 18 Pick. 117.



seems to be based upon what we conceive to be the erroneous assumption that the owner of a spring has no rights whatever in water percolating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land, "for a justifiable cause."

Why anybody should have supposed that the courts would deem it worth while to indulge a litigious spirit so far as to inquire into the motives of a man who has thrown down fences on his own land, put there to mark the lines of a road never lawfully laid out, is not apparent. Such an immaterial inquiry was properly enough refused in *Jenkins v. Fowler*.

Litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry. It was rightly held they were not, in *South Royalton Bank v. Suffolk Bank*.<sup>1</sup> And this is in harmony with the doctrine that proof of malice alone will not support an action for malicious prosecution when there is probable cause. Nor would it be wise as matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground, and it was rightly forbidden in *Benjamin v. Wheeler*.<sup>2</sup> And here we come to the reasons well worthy to be considered, given for the rule in *Phelps v. Nowlen*: "A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well defined rights."

Apparently it is the danger of just such verdicts as that which was rendered in the case at bar, which has induced these courts of high standing to make a sweeping denial of the right to inquire into motives in such cases as we have been reviewing, where no substantial right of the parties complaining has been infringed.

We are not satisfied, however, that the rule can be maintained as broadly as it has been asserted on this account, and we think there is a still greater danger of its being perverted into a bulwark of oppression and injustice, by the denial of a remedy where a substantial right has been invaded. It seems to us that the denial is broader than the cases required. We think it cannot be regarded as a maxim of universal application that "malicious motives cannot make that a wrong which in its own essence is lawful."

*Chatfield v. Wilson* is an authority not to be overlooked, for the

<sup>1</sup> 27 Vt. 505.

<sup>2</sup> 8 Gray, 409.

instructions of Poland, J., there considered and condemned, were not substantially different from those given in the case at bar, and the court say: "It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it,"—apparently assuming that the wanton infliction of damage is not a violation of legal right. Washburn in his *Treatise on Easements, &c.*, has an instructive review of decisions touching this point, (pp. 488–492, 3d ed.) and notices (as do the court in *Phelps v. Nowlen*,) the fact that in the later case of *Harwood v. Benton*,<sup>1</sup> the Vermont court remark upon the absence of any imputation of wanton and improper motive as an element in the defendant's liability, and seem purposely to avoid expressing any opinion as to the correctness of *Chatfield v. Wilson* on that point.

In commenting upon the general aspect of the question, Washburn says in substance, that courts unequivocally recognize one's right to have his well or spring supplied by underground sources so far as to protect it against invasion by a stranger, and he adds: "It would therefore seem to constitute a something of which *meum* and *tuum* might be predicated, and in regard to which the maxim, *Sic utere tuo*, &c., would not be wholly foreign, especially when the party destroying it does it by using his property, not for his own benefit, but solely for the purpose of depriving his neighbor of what he would otherwise have rightfully enjoyed."

Upon the whole we are better satisfied with the view of the law on this point which we get from *Acton v. Blundell*, *Roath v. Driscoll*, *Wheatley v. Baugh*, hereinbefore cited, and from *Panton v. Holland*,<sup>2</sup> and from the instructions approved in *Greenleaf v. Francis*,<sup>3</sup> than with that given in *Chatfield v. Wilson*.

We think this plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it "for the mere, sole and malicious purpose" of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate.

But the testimony is of a character that conclusively negatives the defendant's guilt. The vital facts in the case show that he suffered from a short supply of water now and then during all the years that his aqueduct ran through the plaintiff's land because the plaintiff's premises were lower than his, and the plaintiff persisted, even in dry times, in exercising the advantage which he thereby had. The conclusion upon the whole evidence is irresistible that the defendant, after a long trial, was justified in severing his aqueduct from that which ran to the plaintiff's premises. Upon his doing so, the plaintiff continued his aqueduct as he had a right to do to the spring, and entered it at a

<sup>1</sup> 32 Vt. 737.

<sup>2</sup> 17 Johns. 92, 98.

<sup>3</sup> 18 Pick. 119.

point lower than the defendant, and defendant was again deprived of a sufficient supply. There is no testimony which, fairly weighed, can lead to the conclusion that he dug the well for any purpose except to supply the deficiency that he experienced. The special finding on this point is altogether against the weight of evidence, and must be set aside. *Motion sustained. Verdict set aside. New trial granted.*<sup>1</sup>

<sup>1</sup> Approved in *Stevens v. Kelley*, 78 Me. 445, 452; *Roath v. Driscoll*, 20 Conn. 533, 540, 543, 544 (*semble*); *Greenleaf v. Francis*, 18 Pick. 119 (*semble*); *Swett v. Cutts*, 50 N. H. 439, 447 (*semble*); *Trustees v. Youmans*, 50 Barb. 316, 327 (*semble*); *Wheatley v. Baugh*, 25 Pa. 528, 533 (*semble*) *Accord*.

The question was left open in *Frazier v. Brown*, 12 Oh. St. 299, 303, 304. See *Chasemore v. Richards*, 7 H. L. C. 349, 388; *Smith v. Kenrick*, 7 C. B. 515; *Markby, Elements of Law*, § 239.

The Roman law was in accordance with the principal case: D. 39, 3, de aqua, § 12: "Denique Marcellus scribit cum eo qui in suo fodiens vicini fontem avertit nihil posse agi, nec de dolo actionem: et sane non debet habere, si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit."

The Scotch text-writers adopt the same view: "The law interposes so far for the public that it suffers no person to use his property wantonly to his neighbor's prejudice; *interest reipublice ne quis re sua male utatur.*" *Eskine, Inst.* (8th ed.) book ii. Tit. 1, § 2: "No one, however, is entitled, even within his own limits, to act wantonly, with the mere purpose of producing inconvenience and loss to his neighbor, *in æmulationem vicini*. This, however, is never to be presumed, but must be proved." *Bell, Principles* (9th ed.), § 964. See also *Fraser v. Dewar*, *Mor. Dict.* 12803-4.

In Germany, also, the most authoritative writers allow an action against a defendant who acts out of mere malice. "The exercise of a right is not rendered unlawful by the fact that another is damaged thereby; it is only unlawful to exercise a right solely in order to injure another." *Windscheid, Pandektenrecht* (4th ed.), vol. i., § 121, citing authorities. The German literature upon this subject may be found in *Hesse, Rechtsverhältnisse zwischen Grundstücksnachbarn*, p. 558-568. — ED.

## CHAPTER VIII.

## MALICIOUS CONSPIRACY.

GREGORY v. THE DUKE OF BRUNSWICK AND H. W.  
VALLANCE.

IN THE COMMON PLEAS, NOVEMBER 25, 1843.

*[Reported in 13 Law Journal Reports, Common Pleas, 34.]*

CASE. The declaration stated that the plaintiff, before and at the time of the making of the conspiracy, confederacy, combination, and agreement by the defendants, thereafter mentioned, was about to become an actor, and to use and exercise the profession and occupation of an actor, and to appear at Covent Garden Theatre, in the character of Hamlet, at the request of A. Bunn, for reward to be paid to the plaintiff, by the said A. Bunn. Yet the defendants, together with other persons, whose names were unknown to the plaintiff, falsely, wickedly, and maliciously, did among themselves conspire, combine, confederate, and agree together, to prevent the plaintiff from performing in public, as such actor as aforesaid, in the character of Hamlet, &c., and to prevent the plaintiff from exercising his said profession or occupation of an actor. That the defendants, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, had, among themselves and the said other persons as aforesaid, and in order to carry the same into fulfilment, hired and engaged divers, to wit, two hundred persons, whose names are unknown to the plaintiff, to attend; and they did accordingly attend as part of the audience in the said theatre on the occasion when the plaintiff was to perform as aforesaid, to hoot, hiss, groan, and yell at and against the plaintiff, and to make a great noise, outcry, uproar, and riot at, and against the plaintiff during his performance of the said character, &c., and to aid and assist the defendants and the said other unknown parties first mentioned in carrying into effect and fulfilment their unlawful and malicious conspiracy, combination, confederacy, and agreement aforesaid. The declaration then averred that the plaintiff did appear and perform as such actor, in the character of Hamlet, for reward to be paid to him by A. Bunn, and that while he was so appearing and performing, &c., the defendants, in pursuance of the said malicious conspiracy, confederacy, &c., did, together with divers others of the said persons so hired and engaged, &c., in the said theatre, and in the presence and hearing of the plaintiff, and of the said public audience, hoot, hiss, &c., at the plaintiff, and make a great, hideous, and intoler-

able outcry against the plaintiff, and induce other persons to join in the same, insomuch that the plaintiff was in consequence thereof compelled to desist from the performance of the character of Hamlet, on the occasion aforesaid. There was an allegation of special damage thereby, that A. Bunn was obliged to refuse and did refuse to allow the plaintiff to perform at subsequent times, as an actor in the said theatre, for gain and reward, as the said A. Bunn otherwise might and would have done, and that the plaintiff had been thereby hindered from exercising his profession of an actor, &c.

*Pleas* — First, Not guilty.

The cause came on for trial before Tindal, C. J., at the Middlesex sittings, after last Trinity term, when the plaintiff's counsel stated, that the question for the jury upon the record was, whether the defendants had not conspired to injure the plaintiff in his character as an actor, and to drive him from the stage. Evidence was given which proved that there had been a riot at the theatre, by which the plaintiff was prevented from performing as an actor, and it was sought to show that this riot had been instigated and brought about by previous preconcert between the defendants and others. The learned Chief Justice told the jury that the question for them was, whether a conspiracy had been entered into by the defendants, and whether in pursuance of such conspiracy they were engaged in the proceedings mentioned in the declaration. The jury found a verdict for the defendants.

*Shee*, Serjt., in this term, (November 6), moved for a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection, and that the verdict was against the evidence.

COLTMAN, J. In this case, a new trial was moved for, first, on the ground of misdirection; and, secondly, on the ground that the verdict was against evidence. The alleged misdirection on the part of the Lord Chief Justice consisted in his omitting to tell the jury that either of the two defendants might be found guilty of the charge contained in the declaration, although the other was acquitted, and in his telling them that unless a conspiracy was proved against both the defendants, they ought to find their verdict for the defendants. My Brother Shee, in moving for the rule, said, that in his address to the jury, upon the trial of the cause, he did not insist upon the point, that a verdict might be found against one of the defendants only, because he thought that the interests of his client would be better served, if the attention of the jury were confined to the charge of conspiracy. After this deliberate election, my brothers Erskine and Maule concur with me in thinking that the learned serjeant is not entitled to come to the court for a new trial on the ground of misdirection. It may be true, in point of law, that upon this declaration the plaintiff might have obtained a verdict against one of the defendants only; but the only question raised by him at the trial, and to which the whole of the evidence was directed, was whether there was in fact any malicious

conspiracy and combination on the part of the defendants. When, therefore, the counsel for the plaintiff thought proper at the trial to rest his whole case upon the charge of conspiracy, the judge was warranted in saying, that unless the conspiracy was made out, the defendants must succeed, as it would have been unfair to have submitted to the jury a question to which the attention of the defendants' counsel had not been called. There is no ground, therefore, for a rule upon the first point. As to the second point, the court thinks the matter deserving of further consideration; and therefore, upon the ground that the verdict was against evidence, a rule *nisi* will be granted.

*Rule refused on the first and third points ;  
rule nisi granted on the second point.*



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